Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

HOSPITAL SAN FRANCISCO, INC.,

Petitioner,

v.

GLORIA IVETTE CORREA GONZALEZ, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

JAY A. GARCIA-GREGORY
Counsel of Record, and
LUIS A. OLIVER
FIDDLER, GONZALEZ & RODRIGUEZ
PO Box 363507
San Juan, PR 00936-3507
Telephone: (809) 759-3159
Fax No.: (809) 759-3109

IGOR J. DOMINGUEZ
El Monte Mall, Suite 22
652 Muñoz Rivera Avenue
Hato Rey, PR 00918
Telephone: (809) 250-0220/0212
Fax No.: (809) 250-0295

Attorneys for Petitioner

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the relatives of an aggrieved individual patient have standing to sue under the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. §1395dd et seq., for the recovery of their personal damages suffered as a result of a Hospital's violation of the statute.

2. Whether a challenge to the standing of the relatives of an aggrieved individual patient to bring an action under EMTALA is subject to waiver when it is based on prudential considerations of standing, related to, but not directly rooted in Article III of the Constitution.

3. Whether a Court of Appeals must entertain such a challenge when the issue is decided on the merits by the district court.

LIST OF PARTIES

Petitioner is Hospital San Francisco, Inc. a Puerto Rico corporation. Hospital San Francisco is a subsidiary of Hospital San Pablo, Inc. and has no non-wholly owned subsidiaries.

Respondents are Gloria Ivette Correa González, Esther Isaura Correa González, Angel Sigfredo Correa González, Angela López, in representation of her minor daughters Glendalis Correa López, Angelis Correa López, and Sarai Correa López, heirs and survivors of individual patient Carmen Gloria González.

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OPINION BELOW

The First Circuit's Opinion, reported at 69 F.3d 1184 (1st Cir. 1995) appears in the Appendix ("A") to this Petition at pp. 1-31.

JURISDICTION

The First Circuit's Opinion and Judgment were entered October 31, 1995. A Petition for Rehearing and Suggestion for Rehearing *en Banc* was denied by order dated November 28, 1995. A. 48. This Petition is being filed within ninety days thereafter. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND COURT RULES INVOLVED

Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. §1395dd, which due to its length, is set out in its entirety in the Appendix, A. 56-66.

Fed. R. Civ. P. 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings.

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient matter evidentiary basis for a reasonable jury to find for that party on that

issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law by maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial.

Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion for Judgment as a Matter of Law.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party against whom judgment as a matter of law has been rendered may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law.

If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing

in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Fed. R. Civ. P. 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

U.S. CONST. ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases

affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

STATEMENT OF THE CASE

Respondents, three adult children and four grandchildren of decedent Carmen Gloria González-Figueroa ("respondents"), brought suit against petitioner, Hospital San Francisco ("HSF") in the United States District Court for the District of Puerto Rico alleging two violations of the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. §1395dd (1988 & Supp. v. 1993) and a pendent claim for medical malpractice under local law. Respondents sued in two capacities. As Ms. González's heirs, they asserted a representative-capacity claim for her pain, suffering and related damages. As individuals, they simultaneously asserted claims for their own pain, suffering, mental anguish, and kindred losses. Respondents' Complaint is reproduced in the Appendix, A. 49-55.

Following a trial, the District Court dismissed the malpractice claim, and the plaintiffs' case went to the jury on the two theories of EMTALA liability. The jury awarded $200,000 in damages for the pain, suffering and mental anguish of decedent and $500,000 in damages for the personal pain, suffering and mental anguish experienced by the respondents.

On October 31, 1995, the United States Court of Appeals for the First Circuit affirmed the judgment entered by the District Court on a jury verdict for $700,000 in favor of respondents. *See, Gloria Ivette Correa v. Hospital San Francisco,* 69 F.3d 1184 (1st Cir. 1995), A. 1.

The First Circuit acknowledged that it was interpreting EMTALA for the first time. The court, without oral

argument[1] affirmed the jury verdict and a post trial opinion and order by the District Court on issues of liability and respondents' entitlement to damages and standing to sue under EMTALA. The District Court's opinion is reproduced in the Appendix, A. 32-47.

This Petition for certiorari addresses only that portion of the Circuit's opinion, Part IV(C)(1), which finds that respondents, as relatives of the decedent Carmen González are entitled to recover for their own personal damages under EMTALA, as distinguished from the personal harm suffered by decedent because of HSF's violations of certain EMTALA requirements. This issue of federal law is one of first impression for this Court, and given the First Circuit's procedural treatment of the question, this Court must intervene to settle a conflict among circuits concerning the waiver of standing arguments.

In affirming this award of damages, the First Circuit has judicially conferred standing to sue under the statute to an extent never contemplated by Congress and impermissibly expanded through judicial legislation a hospital's potential liability under EMTALA, in direct contravention of express congressional intent, as evidenced by the statute's language and legislative history. This unbounded, judicially crafted liability could spell

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[1] Oral argument of this appeal had been scheduled for September 7th, 1995. Due to the imminent threat of Hurricane Luis, counsel for HSF could not be present. Counsel for HSF believed that oral argument would be rescheduled. However, to HSF's complete surprise, the Circuit dispensed with oral argument altogether. HSF sought to have oral argument rescheduled through motion but it was denied. Also denied was HSF's Motion for Leave to Supplement Argument on the issues.

disaster for Hospitals nationwide and frustrate the legitimate congressional objectives underlying EMTALA. Additionally, in refusing to review this issue, because of an alleged waiver by HSF, the First Circuit has so far departed from this Court's precedent and so egregiously altered Congressional power to establish federal question jurisdiction, that this Court should grant certiorari and modify the Circuit's opinion.

REASONS FOR GRANTING THE WRIT

1. EMTALA does not give standing to an individual's relatives to seek redress for their own personal damages suffered as a result of a Hospital's violation of the statute.

The relatives of an aggrieved individual patient who seeks treatment at a participating Hospital lack standing under EMTALA to sue for the recovery of their personal damages. Section 1395dd(d)(2)(A), provides in relevant part:

> *"Any individual who suffers personal harm as a direct result of a participating hospital's violation* of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the state in which the hospital is located, and such equitable relief as is appropriate." (emphasis ours).

It is by now well established that the "irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is

(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *United States v. Hays*, 132 L.Ed.2d 635, 642 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).

Beyond these constitutional requirements, the federal courts have also adhered to a set of prudential principles that bear on the question of standing. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982). One of these is the requirement, first announced in *Data Processing Service v. Camp*, 397 U.S. 150, 153 (1970), that the plaintiff establish that the injury complained of (*his* aggrievement, or the adverse effect upon *him*) falls within the 'zone of interests' sought to be protected by the statute whose violation forms the legal basis for his complaint. *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 111 S.Ct. 913 (1991) (emphasis in original). Although the 'zone of interest' formulation first appeared in cases brought under §10 of the Administrative Procedure Act (APA), 5 U.S.C. §702, this Court has subsequently made clear that the same test governs claims under the Constitution in general, *see, e.g. Valley Forge, supra*, at 475, and under particular statutory provisions. *See Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 400 n.16 (1987) (recognizing applicability of 'zone of interest' test in the context of a standing inquiry under constitutional or statutory provisions outside of the review provisions of the APA); *Block v. Community Nutrition Institute*,

467 U.S. 340, 345-348 (1984); *Holmes v. SIPC*, 502 U.S. 437, 112 S.Ct. 789 (1992) (Scalia, J., concurring in judgment) (discussing application of 'zone of interest' test to an action under RICO). Indeed, this Court has indicated that the test is to be more strictly applied when a plaintiff is proceeding under a constitutional or statutory provision instead of the "generous review provisions of the APA." *Clarke v. Securities Industry Ass'n, supra; see also Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789 (1991) (Scalia, J., dissenting).

Clarke explains that the "zone of interests" test simply provides a method of ascertaining whether Congress intended to permit a particular plaintiff to bring an action. *Bennett v. Plenert*, 63 F.3d 915, 918 (9th Cir. 1995). In this respect, the Court's decision in *Clarke* merely reflects the understanding that, at bottom, questions of standing turn on congressional intent, "and all indicators helpful in discerning that intent must be weighed." *Clarke*, 479 U.S. at 400. Significantly however, "*Clarke* concludes that the statutory purposes should be divined by considering the particular statutory provision that underlies the complaint within the 'overall context' of the act itself." *Bennett, supra* (citing *Clarke*, 479 U.S. at 401.)

A straightforward application of these principles of judicial interpretation to the facts of this case leads to the inexorable conclusion that the plain text of EMTALA precludes a finding that the relatives of an aggrieved individual patient have standing to bring a claim under the statute for redress of their own personal damages

suffered as a result of the Hospital's violation of its provisions.[2]

A. EMTALA's Statutory Structure.

As noted above, the usual starting point for zone-of-interests analysis is the text of the provision at issue. *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 111 S.Ct. 913, 918-919 (1991); *Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789, 808 (1992) (Scalia, J., dissenting). "If the intent of Congress is clear, that is the end of the matter, for the court . . . must give

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[2] Although it believes the First Circuit erred in finding that the evidence was legally sufficient to establish a violation by HSF of the EMTALA screening requirements, HSF is not challenging this portion of that court's opinion. Indeed, HSF has deposited in court the amount of $200,000 corresponding to the jury's assessment of the damages suffered by decedent Carmen González for personal harm suffered as a direct result of a violation of EMTALA's screening requirements. Under Puerto Rican law these damages are inherited by decedent's relatives and may be properly claimed by them under EMTALA. *See, Viuda de Delgado v. Boston Ins. Co.*, 101 D.P.R. 598, 599-600 (1973), 101 P.R. Off. Trans. 823, 825 (1973) (Court distinguishes between the personal action of the deceased for damages he suffered prior to death and the independent action corresponding exclusively and by own right to deceased's close relatives for their own damages). The First Circuit mistakenly assumed, however, that because the relatives had standing under EMTALA to seek damages inherited by them as survivors of decedent, they automatically acquired standing to bring their own claim for personal damages under the statute. It is this last ruling which is being challenged here.

effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-843 (1984).

In this case, the First Circuit's opinion read §1395dd(d)(2)(A) in isolation as being susceptible of two constructions: the words "individual" or "direct" could denote the "patient herself" or could denote an "individual" who has a "special relationship with" the patient. 69 F.3d at 1196. A. 23-24. The court, however, in adopting the latter construction of the section overlooked both the structure of EMTALA as a whole and its legislative history. Had it followed the correct canons of judicial interpretation, the court would have come to only one conclusion: EMTALA does not give standing to an individual's relatives to sue for their own damages as a direct result of a Hospital's violation of the statute.

A look at EMTALA's structure reveals that the word "individual" is consistently used in other sections of the statute to mean *someone who requests examination or treatment at a participating hospital*, that is, a *"patient"* as distinguished from another *"person"* who may be acting on the individual's behalf. Congress consistently used the word "individual" in all sections as distinguished from "person" and omitted the word "person" from the civil enforcement section. This distinction clearly shows that the word "individual" in the enforcement section has the same meaning it has in the other sections of the statute, that is "an individual" who requests treatment.[3] A listing

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[3] In deciding whether plaintiff, a nine-year-old child, stated a claim under EMTALA when he failed to come to a hospital's

of the sections with their pertinent language will definitely show that the word "individual" is equivalent to "patient" or prospective patient as distinguished from the word "person":

> §1395dd(a) ("In the case of a hospital that has a hospital emergency department, if *any individual . . . comes to the emergency department and a request is made on the individual's behalf for examination or treatment of a medical condition . . .* ");
>
> §1395dd(b)(1) (If *any individual . . . comes to a hospital* and the hospital determines that the *individual has an emergency medical condition . . .*);
>
> §1395dd(b)(2) (A hospital is deemed to meet the requirement of paragraph (a)(A) with respect to an *individual,* if the hospital offers the *individual* the further *medical examination and treatment* described in that paragraph and informs the *individual* (or a *person acting on the individual's behalf*) of the risks and benefits to the *individual* of such *examination and treatment,* but the *individual* (or *a person acting on the individual's behalf*) refuses to consent to the examination and treatment. The hospital shall take all reasonable

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emergency department, the U.S. Court of Appeals for the Fifth Circuit has held that "the language of the statute unambiguously describes the individuals covered by §1395dd as those who come to the emergency department" and who request treatment or on whose behalf treatment is requested. *Miller v. Medical Center of Southwest Louisiana,* 22 F.3d 626-630 & n. 7 (5th Cir. 1994). This judicial construction supports the synonymous character of "individual" and "patient" for purposes of the statute's enforcement provisions, and is therefore seemingly in conflict with the First Circuit's decision in this case.

> steps to secure the *individual's* (or *person's*) written informed consent to refuse such examination and treatment.");
>
> §1395dd(b)(3) ("A hospital is deemed to meet the requirement of paragraph (1) with respect to an *individual* if the hospital offers to *transfer the individual* to another medical facility in accordance with subsection (c) of this section and informs the *individual* (or a *person acting on the individual's behalf*) of the risks and benefits to the *individual* of such transfer, but the individual (*or a person acting on the individual's behalf*) refuses to consent to the transfer. The hospital shall take all reasonable steps to secure the *individual's* (or *person's*) written informed consent to refuse such transfer.");
>
> §1395dd(c)(1) ("If an *individual at a hospital has an emergency medical condition which has not been stabilized* . . . the hospital may not transfer the *individual* unless
>
> > (A)(i) the *individual* (or *a legally responsible person acting on the individual's behalf*) . . . "). (Emphasis added in all sections).

The word "individual" in the civil enforcement section (an integral part of EMTALA) is obviously the patient or individual who has requested examination or treatment at a participating hospital. Had Congress meant to include other "persons" within the concept of "individual" it would have expressly used the word "person" instead of "individual" in the civil enforcement section. As we shall see below, Congress did initially use the word "person" in the civil enforcement section but thereafter amended it so as to conform to the other sections which obviously refer to an individual patient. Any

doubts, of course, especially as to the virgin issue of who is entitled to sue under this section must be resolved by resort to the statute's legislative history. *See, Air Courier Conference, supra; Eberhardt v. City of Los Angeles*, 62 F.3d 1253, 1256 (9th Cir. 1995).

B. EMTALA's Legislative History.

EMTALA's Legislative History conclusively shows that the word "individual" in 42 U.S.C. §1395dd(d)(2)(A) is equivalent to "patient" and that Congress expressly used the word "individual" instead of "person" or "entity" to limit recovery under the Act only to individual patients suffering personal harm or injury as a direct result of a hospital's violation of the Act's requirements. *See Bryant v. Riddle Memorial Hospital*, 689 F. Supp. 490, 491 (E.D. Pa. 1988).

The original civil enforcement provision of EMTALA was part of H.R. 3128,[4] which as originally reported by the House Ways and Means Committee reads as follows:

> *"Any person or entity adversely and directly affected* by a participating hospital's violation of these requirements may bring an action, in an appropriate state or Federal district court, *for damages to the person arising from the violation* and for other relief as may be appropriate to remedy the violation or deter subsequent violations." (Emphasis supplied).

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[4] This House version of EMTALA eventually became the basis for the current Act. Section 124 of H.R. 3128 became the actual §1395dd(d)(2)(A), after it was substantially amended by the Judiciary Committee.

The Committee on the Judiciary immediately focused on the breadth of the enforcement provisions in H.R. 3128. After concurring with the findings of the Committee on Ways and Means with regard to the need to ensure that appropriate emergency room care be provided to patients faced with medical emergencies and in active labor, the Judiciary Committee expressed concern that the sanctions contemplated in H.R. 3128 be properly designed to achieve their above stated goal. H.R. Rep. No. 241 (III), 99th Cong., 1st Sess. 6, *reprinted in* 1986 U.S. Code Cong. & Admin. News 727. The Judiciary Committee observed that the language used by the Ways and Means Committee which established a federal cause of action did not precisely identify which parties could bring an action under the provision, nor did it identify those against whom they could bring such action. H.R. Rep. No. 241 (III), 99th Cong., 1st Sess. 6, *reprinted in* 1986 U.S. Code Cong. & Admin. News 728. As a result, the Judiciary Committee presented an amendment which clarified the enforcement provisions.

The Committee amendment made it clear that the section authorizes only two types of actions for damages. "The first of these could be brought *by the individual patient who suffers harm as a direct result of a hospital's failure to appropriately screen, stabilize or properly transfer that patient.* The second type of action could be brought by a medical facility which received an improperly transferred emergency patient (within the meaning of §124) or a woman in active labor." (Emphasis added). *Id. Bryant*, at 493.

The Judiciary Committee also expressed its desire to avoid unwarranted judicial expansion or "recognition" of rights and liabilities under §1395dd(d)(2)(A) beyond those granted to individual patients and those imposed on participating hospitals:

> "The vagueness of the provision [the former section reported by Ways and Means] *would not only leave the rights and liabilities of parties unclear, it also would place an unnecessary burden on the courts to define these rights and liabilities." Id.*

The foregoing Congressional intent makes it crystal clear that Congress only authorized the individual who was refused treatment to bring an action for personal injury under EMTALA. The deletion of all-encompassing words such as "person or entity . . . affected" leaves no doubt that Congress only wanted to protect the individual from being "dumped" by a hospital, not to create a sweeping federal cause of action against a hospital for negligence, malpractice or wrongful death by those related to the individual patient. These views are consistent with other portions of the Judiciary Committee's Report where the Committee expresses its concern that the formerly broad language used to create an EMTALA cause of action could result in hospitals deciding to close their doors rather than risk substantial damage awards and civil penalties. *See*, H.R. Rep. No. 241 (III), 99th Cong., 1st Sess. 6, *reprinted in* 1986 U.S. Code Cong. & Admin. News 728.

In this case, the First Circuit rejected HSF's specific legal objection that EMTALA does not give standing to decedent's relatives to seek redress for their own personal damages. Specifically, it held that HSF "forfeited"

this theory of defense. The court then misapplied the stringent plain error standard of review to find sufficient evidence to support the jury's verdict. 69 F.3d at 1194-1197. A. 18-24.

Under the court's truncated plain error analysis, it found that the statute was facially susceptible to divergent, but equally plausible interpretations, without any consideration of EMTALA's structure, context, and legislative intent. This constitutes in itself, plain error, for two related reasons. First, whether the relatives of an aggrieved individual patient have standing to sue under EMTALA is a jurisdictional issue. Second, the court's determination that the applicable civil enforcement provision of EMTALA is ambiguous compelled it to analyze, as it failed to do, its statutory structure, context, and legislative history. This mandatory analysis would have revealed conclusively that Congress intended to provide a civil remedy only to the individual patient.

Applying the above mentioned principles of statutory construction, it is plain that EMTALA does not provide standing to relatives of an aggrieved individual who seeks treatment at a participating Hospital, to sue for their own personal damages as distinguished from those suffered by the aggrieved individual. Therefore, the jury's verdict for $500,000 in favor of such relatives, without a lawful source of power, cannot stand.

This Court must interpret the statute the way Congress intended it to be interpreted, grant this Petition for certiorari, and reverse the First Circuit's opinion allowing respondents to claim damages under EMTALA beyond the actual personal injuries suffered by decedent Carmen

González, and inherited by them. Any other interpretation would frustrate the objectives of the statute and lead to an absurd result Congress never intended; one that would be demonstrably at odds with the intentions of EMTALA's drafters. Indeed, as this Court has emphasized: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984); *see also, Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20 (1979) (" . . . it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it: 'When a statute limits a thing to be done in a particular mode, it includes the negative of another mode'.")

Should this Court allow the First Circuit's decision to stand, the nightmare for hospitals that Congress foresaw and attempted to avoid by amending the originally vague enforcement provision reported by the House Ways and Means Committee, would become a reality, as courts will become flooded with third party claims never contemplated by the statute.[5]

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[5] Limitation of standing to sue for civil enforcement under EMTALA to the individual seeking treatment or to the estate of the individual in those state jurisdictions that recognize transmission of personal injuries through inheritance by death would not prompt hospitals to dump patients or otherwise violate the Act. The statute provides for heavy civil penalties in §1395dd(d)(1) against both noncomplying hospitals and physicians. Besides, in §1395dd(d)(2)(B) other medical facilities

2. HSF's challenge to the standing of the relatives of an aggrieved individual patient to bring an action under EMTALA is not subject to waiver.

Questions of standing are not subject to waiver. *United States v. Hays*, 132 L.Ed.2d 635, 642 (1995). Rather, courts are "required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before [them]. The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." *Id.* (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231 (1990)).

The present case affords this Court the opportunity to settle a conflict among circuits and clarify whether this bright line statement applies with equal force when prudential considerations of standing, rather than Article III minimum requirements, constitute the basis of the challenge to the court's jurisdiction.

This Court has given mixed signals in this regard. For example, in *Craig v. Boren*, 429 U.S. 190, 192-194 (1976), the Court hinted that the prudential standing requirement which generally requires a party to assert its own rights, not the rights of others, could be waived if not raised in a timely fashion by a defendant. *See Elkin v. Fauver*, 969 F.2d 48, 52 n.1 (3d Cir.) (citing *Craig* for the

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may sue offending hospitals. Additionally, a noncomplying hospital could lose Medicare certification as a provider of health services. *See*, e.g., 42 U.S.C. §1395cc(b)(2) (Refusal to renew or termination of agreements with Secretary of Health and Human Services).

proposition that prudential standing is not jurisdictional), *cert. denied*, 113 S.Ct. 473 (1992).

More recently however, as in the passage quoted above from *Hays*, the Court has held broadly that issues of standing may never be waived, in part because the "rules of standing, whether as aspects of the Article III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention." *Bender v. Williamsport Area School District*, 475 U.S. 534, 546 n.8 (1986) (citing *Warth v. Seldin*, 422 U.S. 490, 517-518 (1975)); *see also, National Organization for Women, Inc. v. Scheidler*, ___ U.S. ___, 114 S.Ct. 798, 802 (1994) ("Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation.").

Notwithstanding the apparent ambiguity in the decisions of this Court, most of the Circuit Courts of Appeals have held that prudential standing requirements, like their Article III counterparts, cannot be waived. This was the holding of the Sixth Circuit in *Community First Bank v. National Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994), where the court found no authority to support plaintiff's contention that prudential standing requirements may be waived by the parties, and instead warned that "recognizing a distinction between prudential and constitutional standing requirements in this context might give careless parties power to override congressional intent." *Id.*

Similarly, the District of Columbia Circuit has repeatedly held that "standing, whether constitutional or prudential, is a jurisdictional issue which cannot be waived or conceded." *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C.Cir. 1994). *See also, Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 499 (D.C.Cir. 1994) ("The zone of interests test is jurisdictional, so that it is our duty to consider the issue regardless of the defendant's failure to raise the issue in this court (as in this case), or in the trial court.") (Williams, J., concurring in part, dissenting in part); *National Wildlife Federation v. United States*, 626 F.2d 917, 924 n.13 (D.C.Cir. 1980) (Appellee's purported waiver of prudential limitations on standing is necessarily ineffective because standing implicates federal jurisdiction).

In *Thompson v. County of Franklin*, 15 F.3d 245 (2d Cir. 1994), the County argued that Thompson was procedurally barred from making certain arguments on appeal in support of her standing because she failed to raise them in the district court. The Second Circuit recognized that the concept of standing – even its prudential dimension – acts as a limitation on federal court jurisdiction. Accordingly, it adopted the established view that standing is at heart a jurisdictional prerequisite to a federal court's deliberations, and held that it had an independent obligation to examine Thompson's standing, even on appeal and under arguments not raised below, reasoning that the jurisdictional nature of the standing inquiry so required. *Id.* at 248.

The Circuit Courts have not been unanimous, however. At least one circuit has resolved the issue differently. In *Lindley for Lindley v. Sullivan*, 889 F.2d 124 (7th

Cir. 1989), the Seventh Circuit found that defendant's failure to suggest in the district court that prudential considerations should bar plaintiff from suing on his parent's behalf prevented the court from considering the arguments on appeal. *Id.* at 129 (citing *Craig v. Boren*, 429 U.S. at 193-194).

Recently, the Third Circuit in *UPS Worldwide Forwarding, Inc. v. U.S. Postal Service*, 66 F.3d 621, 626 n.6 (3d Cir. 1995), expressly noted this conflict among the circuits. In that instance however, the court declined to expressly follow or distinguish its prior decision in *Elkin v. Fauver*, 969 F.2d 48, 52 n.1 (3d Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 473 (1992), where it held that prudential limitations on standing were not jurisdictional. *UPS Worldwide Forwarding, Inc.*, 66 F.3d at 626 n.6.

Here, while not specifically characterizing the issue as one of standing, the First Circuit found that HSF's challenge to the standing of decedent's relatives to recover under EMTALA for their own personal damages was untimely. Effectively, it held that HSF's challenge to the relatives' standing was subject to waiver, and therefore declined to review the issue except under a plain error standard. 69 F.3d at 1195-1196. A. 19-23.

Given the confusion among the circuits regarding this important question of federal law, and in view of the fact that it is one which is likely to recur, this Court is duty-bound to step in and clarify this issue. More so, since the very purpose of the standing requirement would seem to compel the finding that even in its prudential dimension, it is not susceptible of waiver or concession. As this Court has forcefully stated in the past,

standing doctrines "state fundamental limits on federal judicial power in our system of government." *Allen v. Wright*, 468 U.S. 737, 750 (1984). *See also, Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789, 809 (1992) (Scalia, J., dissenting) (citing *Allen*, and asserting that standing performs a separation-of-powers function, restricting the courts to their traditional role).

3. The First Circuit's misapplication of the plain error exception contravenes Supreme Court precedent holding that when a separable issue of law of novel and exceptional importance not subject to retrial is decided on the merits by a District Court the issue is preserved on appeal.

The First Circuit's opinion acknowledges that "questions such as whether a statute authorizes damages in particular instances or in favor of particular parties are quintessentially legal in nature," and must be afforded "*de novo* review." 69 F.3d at 1195. A. 19.

It then, *sua sponte*, reviews the record[6] and concludes that HSF voiced too late its claim that respondents were not entitled to recover their own damages under EMTALA. The court, however, does not mention that the District Court in its post verdict opinion and order on HSF's Motion for Judgment as a Matter of Law *did* consider the *merits* of the question whether respondents were entitled to recover for their own damages as distinguished from those of decedent Carmen González. A. 42.

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[6] Respondents grounded their waiver arguments only on the failure of HSF to object to the jury instructions under Fed. R. Civ. P. 51.

The First Circuit's decision runs contrary to Supreme Court precedent. Under *Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981), the First Circuit was compelled to review the District Court's opinion and order denying HSF's rule 50(b) post verdict motion[7] on the issue whether appellees could recover for their own damages and not just those suffered by the individual patient Carmen González, even if this issue of standing is deemed by this Court to be subject to waiver as a matter of law.

In *Facts Concerts* the City of Newport had not objected in the District Court to a jury instruction that authorized the jury to award punitive damages in a civil rights action under 42 U.S.C. §1983. In deciding a post trial motion for a new trial by the City, the District Court noted that the challenge to the award was untimely but nonetheless ruled on the merits, denying the City's motion. 453 U.S. at 253. The First Circuit Court of Appeals affirmed, finding no occasion to apply the plain error rule, because the error had not "affected the fairness, integrity or public reputation of a judicial proceeding." It also intimated that the "challenged instruction may not have been error at all." 453 U.S. at 254-255. The Supreme Court reversed holding that:

> "*Because the District Court reached and fully adjudicated the merits, and the Court of Appeals did not disagree with the adjudication,* no interests in fair and effective trial administration advanced by

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[7] HSF also moved in the District Court under Fed. R. Civ. P. 59(e) to amend the judgment on the issue of appellees' entitlement to their own damages under EMTALA.

> Rule 51 would be served if we refused now to reach the merits ourselves." (Emphasis added).

453 U.S. at 256.

The Court also rejected the "plain error" analysis used by the First Circuit and held that "[t]he very novelty of the legal issue at stake counsel[ed] unconstricted review," "[was] important" and "[appeared] likely to recur in §1983 litigation." 453 U.S. 257. In a footnote the Court noted that usually errors in jury charges are difficult, if not impossible to correct without retrials. However, the issue of liability for punitive damages involved a "wholly separable issue of law, on which the jury rendered a special verdict susceptible of rectification without further jury proceedings." 453 U.S. 256 n.12.

HSF stands in the same position before this Court as the City of Newport stood before the Supreme Court in *Facts Concerts* with respect to the issue of respondents' standing to sue for their own damages under EMTALA. Although *Facts Concerts* dealt with waiver under Rule 51, its rationale and compelling reasons for the preservation of appellate review of a legal question not subject to retrial is equally applicable in the context of motions for judgment as a matter of law under Rule 50. *See, e.g., Federal Savings and Loan Insurance Corporation v. Reeves,* 816 F.2d 130, 137 (4th Cir. 1987). *See also, Singer v. Dungan,* 45 F.3d 823, 828-829 (4th Cir. 1995) (Discussing cases adopting a liberal view of preservation of a party's rights under Rule 50). The First Circuit should therefore have afforded HSF the same treatment the Supreme Court afforded the City of Newport, especially since the District Court here ruled on the merits of the individual patient's

relatives' entitlement to damages without even hinting at waiver, thereby making this a stronger case for plenary review.[8]

Recently, this Court exercised its discretion to review a case where petitioner not only failed to raise the issue in the lower courts, but affirmatively disavowed it, and did not explicitly raise it for the first time until after the Court granted certiorari, in his brief on the merits. *Lebron v. National R. Passenger Corp.*, 513 U.S. ___, 130 L.Ed.2d 902 (1995). In *Lebron*, the Court reiterated its traditional rule that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* at ___, 130 L.Ed.2d at 909. The Court also stressed that review of an issue not pressed is permissible so long as it has been passed upon. *Id.* at ___, 130 L.Ed.2d at 910 (citing *United States v. Williams*, 504 U.S. 36, 118 L.Ed.2d 352 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991)). The circumstances surrounding petitioner's disavowal of his arguments in

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[8] The First Circuit has strictly adhered to the waiver rule under Rule 51, indeed it has invoked it with "near religious fervor", see, e.g., *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 627 (1st Cir. 1995). Nevertheless, even it has acknowledged that *Facts Concerts* may apply in circumstances such as the one at hand where the District Court reaches the merits of the question to be reviewed on appeal. *See*, e.g., *Elwood v. Pina*, 815 F.2d 173, 176 (1st Cir. 1987) (*Facts Concerts* distinguished because the District Court did not reach merits of an associational issue in civil rights litigation. Court also noted that claimed rights to social association was not a clearly established constitutional right).

Lebron are far more suggestive of someone "sleeping on his rights" than those of the instant case. *United States v. Williams*, 504 U.S. at ___, 118 L.Ed.2d at 361. As noted above, HSF *pressed* and the District Court *passed upon* the merits of the arguments raised again by way of this Petition for certiorari. A. 42. Nothing more is needed to warrant review by this Court. *See, Stevens v. Department of Treasury, supra*, 500 U.S. at 8.[9]

Moreover, the issues presented for review are "novel", "counsel unconstricted review", and appear "likely to recur" in EMTALA civil litigation. Additionally, the question of standing involves a "separable issue of law" which need not be retried should the jury award be set aside, just as the punitive damages question did not have to be retried in *Facts Concerts*. It follows then that

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[9] In analogous contexts where litigants have not raised issues below, the Supreme Court has not hesitated to exercise its independent power to apply the proper construction of federal law. *Nat. Bank of Or. v. Independent Ins. Agents*, 508 U.S. ___, 113 S.Ct. 2173 (1993) (considered allegations that federal statute granting remedy was repealed); *U.S. v. Burke*, 504 U.S. 229, 112 S.Ct. 1867, 1877 (1992) (Scalia, concurring) (" . . . the Supreme Court need not render judgment on the basis of a rule of law whose non-existence is apparent on the face of things, simply because the parties agree to it – particularly when the judgment will reinforce error already prevalent in the system"). It is instructive that the *District Court* did *not* reject on waiver grounds, the Hospital's arguments raised in its Rule 50(b) motion. In its opinion and order, the District Court decided the issue squarely on the merits. A. 42. The First Circuit nonetheless, erroneously defaulted in properly reviewing the issue, a default this Court should not reinforce by failing to review the issue on the merits.

this Court must review the issue fully on the merits for reversible error, not plain error.

Finally, the importance of the standing issues presented for review cannot be understated. As noted above, the standing requirements set constitutional and prudential limits on the powers of an unelected, unrepresentative judiciary. *Allen v. Wright*, 468 U.S. at 750 (citing *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-1179 (D.C.Cir. 1983) (Bork, J. concurring)). That is because standing is built on a single basic idea – the idea of separation of powers. *Allen v. Wright*, 468 U.S. at 752. This Court has in the past recognized that "the disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome what Justice Harlan called 'the strong interest of the federal judiciary in maintaining a constitutional plan of separation of powers.' " *Freytag v. Commissioner*, 501 U.S. 868, 115 L.Ed.2d 764, 780 (1991) (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)). Accordingly, even if it deems the standing issue as one subject to waiver, this Court should exercise its discretion to undertake review of this important issue, which was expressly decided by at least one federal court. *United States v. Williams*, 504 U.S. at ___, 118 L.Ed.2d at 363.

CONCLUSION

In sum, it is plain that

A. Congress did not confer standing to sue for personal harm under EMTALA to persons

other than the individual seeking emergency care at a hospital covered by the statute;

B. The District Court had no subject matter jurisdiction over the respondents' claims for their own personal damages due to their lack of standing to sue under EMTALA;

C. Prudential considerations governing issues of standing are not subject to waiver, and therefore remain open to review at any stage of a case;

D. The First Circuit's application of the plain error exception is at odds with Supreme Court precedent, which required the First Circuit to review petitioner's standing arguments on the merits once the District Court passed on the merits of the issue.

Petitioner, therefore, requests this Court to issue a writ of certiorari to the United States Court of Appeals for the First Circuit to review and reverse that portion of the First Circuit's opinion and judgment entered October 31, 1995 which recognizes that respondents have standing to sue for their own damages as distinguished from the personal harm suffered by decedent, Carmen González, the individual patient entitled to sue under EMTALA.

DATED this 26th day of February, 1996.

Respectfully submitted,

JAY A. GARCÍA-GREGORY
Counsel of Record, and
LUIS A. OLIVER
FIDDLER, GONZALEZ & RODRIGUEZ

IGOR J. DOMINGUEZ
LAW OFFICES OF IGOR J. DOMINGUEZ

Attorneys for Petitioner

Gloria IVETTE CORREA, a/k/a Gloria Ivette Correa Gonzalez, et al., Plaintiffs, Appellees,

v.

HOSPITAL SAN FRANCISCO, Defendant, Appellant.

No. 95-1167.

United States Court of Appeals, First Circuit.

Submitted Sept. 6, 1995.

Decided Oct. 31, 1995.

Igor J. Dominguez, on brief, Hato Rey, PR, for appellant.

Kevin G. Little, Los Angeles, CA, and Law Offices of David Efron, Rio Piedras, PR, on brief, for appellees.

Before SELYA, Circuit Judge, COFFIN, Senior Circuit Judge, and BOUDIN, Circuit Judge.

SELYA, Circuit Judge.

This appeal requires us to interpret, for the first time, the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd (1988 & Supp. V 1993).[1] After scrutinizing the record and dovetailing the facts with the statutory scheme, we affirm a $700,000 jury

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[1] In *Wilson v. Atlanticare Med. Ctr.*, 868 F.2d 34 (1st Cir.1989), the plaintiff asked us to consider whether a state statute prescribing a medical malpractice claims procedure applied to suits under EMTALA. *See id.* at 35. We refused, however, because the plaintiff had not preserved the issue. *See id.* at 35-36.

verdict in favor of the heirs and survivors of Carmen Gloria Gonzalez Figueroa (Ms. Gonzalez) against defendant-appellant Hospital San Francisco (HSF or the Hospital).

I. THE FACTS

We are guided through the thicket of conflicting testimony and the chasmal gaps in the direct evidence by the rule that, when the losing party protests the sufficiency of the evidence, the court of appeals must take both the facts and the reasonable inferences therefrom in the light most hospitable to the jury's verdict. *See Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 716 (1st Cir.1994); *Wagenmann v. Adams*, 829 F.2d 196, 200 (1st Cir.1987).

According to her son, Angel Correa, Ms. Gonzalez, a sixty-five-year-old widow, awoke on the morning of September 6, 1991 "feeling real bad," and experiencing "chills, cold sweat, dizziness, [and] chest pains." She requested that Angel take her to the emergency room at HSF (where she had been treated previously). She arrived there no later than 1:00 p.m.

The evidence is conflicted as to whom she saw and what that person was told about her condition. Angel testified that he implored the receptionist to have someone "take care of my mother, because she feels sick and has chest pains." The Hospital disagrees, maintaining that its personnel were told only that Ms. Gonzalez felt dizzy and nauseated. In any event, a Hospital employee assigned the patient a number (forty-seven), told her to

bide her time, and checked her medical insurance card.[2] After waiting approximately one hour, Angel called his sister, Esther Correa, and asked her to relieve him. Esther arrived some fifteen minutes later and Angel left the premises. At that very moment (roughly 2:15 p.m.), he heard an attendant calling patient number twenty-four for treatment.

Now accompanied by her daughter, Ms. Gonzalez maintained her unproductive vigil for an additional forty-five to seventy-five minutes. The Hospital staff continued blithely to ignore her. Weary of waiting, the two women drove to the office of Dr. Acacia Rojas Davis (Dr. Rojas), the director of Hospmed, arriving there between 3:00 and 3:30 p.m. According to Dr. Rojas, a nurse called from HSF to advise her that the patient would be coming to Hospmed for treatment. Dr. Rojas said that this conversation probably occurred earlier that day (perhaps around 1:00 p.m.), a datum suggesting that HSF tried to shunt Ms. Gonzalez to Hospmed as soon as it scrutinized her insurance card.

Ms. Gonzalez informed Dr. Rojas that she was nauseated and had taken a double dose of her high blood pressure medication. Her blood pressure was very low (90/60), and, when she began vomiting, the physician immediately started intravenous infusions of fluids. She also dispensed medicine to control the emesis. Despite these ministrations, Ms. Gonzalez's condition steadily

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[2] Ms. Gonzalez's health insurance plan required her to seek routine treatment at Hospmed (a local clinic) during its business hours, but allowed her to see any appropriate health-care provider in case of an emergency.

deteriorated. Dr. Rojas had to resuscitate her soon after her arrival. The doctor then attempted to transfer her to the Hato Rey Community Hospital, but could not commandeer an ambulance. As Dr. Rojas began preparations to transport Ms. Gonzalez by van, the patient expired. Her death, which occurred at around 4:30 p.m., was attributed to hypovolemic shock.

II. THE PROCEEDINGS BELOW

The plaintiffs – Ms. Gonzalez's three adult children and four of her grandchildren (the progeny of her late son, Felix Correa, who had predeceased her) – brought suit against the Hospital in the United States District Court for the District of Puerto Rico.[3] They alleged two violations of EMTALA – inappropriate screening and improper transfer – and a pendent claim of medical malpractice under local law. Following a trial, the plaintiffs' case went to the jury on the two theories of EMTALA liability.[4] The jury returned a series of special written findings, Fed.R.Civ.P. 49(a), assessed $200,000 in damages on the decedent's account (payable to the heirs), and assessed $500,000 in damages for the pain, suffering, and mental anguish experienced by the survivors – $100,000

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[3] Although their complaint is not a model of clarity, the plaintiffs apparently sued in two capacities. As Ms. Gonzalez's heirs, they asserted a representative-capacity claim for her pain, suffering, and related damages. As individuals, they simultaneously asserted claims for their own pain, suffering, mental anguish, and kindred losses.

[4] The district court dismissed the malpractice claim. That ruling is not before us on appeal.

apiece for the three children (Angel, Esther, and Gloria), and $50,000 apiece for the four grandchildren (Glendalis, Glorimar, Angelis, and Sarai). The district court denied the Hospital's post-trial motions for judgment as a matter of law, a new trial, and remission of damages. This appeal ensued.

III. THE STATUTORY SCHEME

We delineate EMTALA's requirements in order to give definition to the statutory cause of action and place some of its nuances into perspective.

As health-care costs spiralled upward and third-party payments assumed increased importance, Congress became concerned "about the increasing number of reports that hospital emergency rooms are refusing to accept or treat patients with emergency conditions if the patient does not have medical insurance." H.R.Rep. No. 241(I), 99th Cong., 1st Sess. 27 (1986), *reprinted in* 1986 U.S.C.C.A.N. 42, 605. Congress enacted EMTALA to allay this concern. Needing a carrot to make health-care providers more receptive to the stick, Congress simultaneously amended the Social Security Act, conditioning hospitals' continued participation in the federal Medicare program – a lucrative source of institutional revenue – on acceptance of the duties imposed by the new law. *See* 42 U.S.C. § 1395dd(a-b), (e)(2); *see also Abercrombie v. Osteopathic Hosp. Founders Ass'n*, 950 F.2d 676, 680 (10th Cir.1991); *Brooker v. Desert Hosp. Corp.*, 947 F.2d 412, 414 (9th Cir.1991).

We have set out the portions of the statute that are most germane to this appeal in an appendix. For purposes of patients such as Ms. Gonzalez, EMTALA has two linchpin provisions. First, it requires that a participating hospital afford an appropriate medical screening to all persons who come to its emergency room seeking medical assistance. *See* 42 U.S.C. § 1395dd(a). Second, it requires that, if an emergency medical condition exists, the participating hospital must render the services that are necessary to stabilize the patient's condition, *see id.* § 1395dd(b)(1)(A), unless transferring the patient to another facility is medically indicated and can be accomplished with relative safety, *see id.* § 1395dd(b)(1)(B), (c)(1). To add bite to its provisions, EMTALA establishes monetary penalties for noncompliance, *see id.* § 1395dd(d)(1), and authorizes private rights of action against those who transgress its mandates, *see id.* § 1395dd(d)(2).

To establish an EMTALA violation, a plaintiff must show that (1) the hospital is a participating hospital, covered by EMTALA, that operates an emergency department (or an equivalent treatment facility); (2) the patient arrived at the facility seeking treatment; and (3) the hospital either (a) did not afford the patient an appropriate screening in order to determine if she had an emergency medical condition, or (b) bade farewell to the patient (whether by turning her away, discharging her, or improvidently transferring her) without first stabilizing the emergency medical condition. *See Miller v. Medical Ctr. of S.W. La.*, 22 F.3d 626, 628 (5th Cir.1994); *Stevison v. Enid Health Sys., Inc.*, 920 F.2d 710, 712 (10th Cir.1990).

HSF attempts to read into section 1395dd(a) an additional requirement: that the patient show that she in fact suffered from an emergency medical condition when she arrived at the emergency room. But EMTALA imposes no such requirement. The statute by its terms directs a participating hospital to provide an appropriate screening to all who come to its emergency department. Thus, to prove a violation of EMTALA's screening provisions, a plaintiff need not prove that she actually suffered from an emergency medical condition when she first came through the portals of the defendant's facility; the failure appropriately to screen, by itself, is sufficient to ground liability as long as the other elements of the cause of action are met.[5]

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[5] To be sure, some courts have suggested in dictum that a plaintiff must show, as an ingredient of an inappropriate screening claim, that she suffered from an emergency medical condition when she arrived at the hospital. *See, e.g., Miller,* 22 F.3d at 630 n. 8; *Ruiz v. Kepler,* 832 F.Supp. 1444, 1447 (D.N.M.1993); *Huckaby v. East Ala. Med. Ctr.,* 830 F.Supp. 1399, 1402 (M.D.Ala.1993). This suggestion finds no purchase in the statute's text, and we reject it. We note, however, that while this distinction may have implications for civil penalties, which are imposable irrespective of resulting harm, *see* 42 U.S.C. § 1395dd(d)(1)(A), the statutory damage remedy requires a showing of "personal harm as a direct result of a participating hospital's violation of [EMTALA]," *id.* § 1395dd(d)(2)(A). It is difficult to imagine a case in which a patient who does not present an emergency medical condition will meet the statute's causation requirement or fall within the category of those whom it intends to protect. In all events, we can reserve such questions for another day, because the plaintiffs fairly allege that Ms. Gonzalez did present an emergency medical condition, the jury so found, and the evidence to that effect was ample.

IV. ANALYSIS

HSF assigns error in no fewer than eight iterations. It debunks the sufficiency of the evidence in five respects. It then hypothesizes that, even if the evidence on these points can withstand an instructed verdict, it is so anemic that the district court should have repudiated the jury's findings on liability and ordered a new trial. The climax of the Hospital's asseverational array denigrates the award of damages in two respects. After careful perscrutation of both the record and the rich variety of challenges marshalled by HSF, we affirm.

A. *Sufficiency of the Evidence.*

The Hospital's multi-pronged attack calls into play varying standards of appellate review. The first five claims of error all involve the sufficiency of the evidence, and, hence, are reviewed under a familiar set of rules.

The district court's denial of a motion for judgment as a matter of law poses a question of law and, therefore, this court's review of such a ruling is plenary. *See Gibson v. City of Cranston*, 37 F.3d 731, 735 (1st Cir.1994). In addressing such issues on appeal, we must approach the evidence from a coign of vantage identical to that employed by the district court in the first instance. *See Rolon-Alvarado v. Municipality of San Juan*, 1 F.3d 74, 77 (1st Cir.1993). This dictates that we take the record in the light most flattering to the nonmoving party, without probing the veracity of the witnesses, resolving conflicts in the testimony, or assaying the weight of the evidence. *See Gibson*, 37 F.3d at 735; *Wagenmann*, 829 F.2d at 200. We

"may reverse the denial of such a motion only if reasonable persons could not have reached the conclusion that the jury embraced." *Sanchez*, 37 F.3d at 716.

1. ***EMTALA Coverage.*** The Hospital starts its series of sufficiency sorties by solemnly stating that the survivors stumbled in failing to show that it is subject to EMTALA's suzerainty. We need not tarry. HSF tacitly concedes that, in general, federal courts have jurisdiction over EMTALA claims, *see Thornton v. Southwest Detroit Hosp.*, 895 F.2d 1131, 1133 (6th Cir.1990), but argues that the plaintiffs did not prove a requisite predicate fact: that HSF had accepted the federal government's carrot and agreed to come under EMTALA.[6] This argument has the shrill ring of desperation.

The plaintiffs introduced into evidence, without objection, HSF's policy statement outlining for its

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[6] In its brief, the Hospital treats this issue as implicating the court's subject matter jurisdiction. The Hospital, of course, could have raised the question in that form by a pretrial motion, *see* Fed.R.Civ.P. 12(b)(1), but refrained. Since the defendant did not so move, and since the disputed fact is one that has the capacity not only to oust the federal court of jurisdiction but also to defeat the claim on the merits (because the same fact that is needed to support jurisdiction must also be demonstrated to the factfinder in order for the plaintiff to prevail), an appellate court should evaluate the jury's factual finding under a sufficiency-of-the-evidence test. *Cf. United States v. Victoria-Peguero*, 920 F.2d 77, 87 (1st Cir.1990) (undertaking sufficiency-of-the-evidence review following a jury determination that a ship was within territorial waters, where such a fact was both a predicate for criminal jurisdiction and an element of the offense charged), *cert. denied*, 500 U.S. 932, 111 S.Ct. 2053, 114 L.Ed.2d 458 (1991).

employees and associates how the Hospital intended to ensure compliance with EMTALA in its emergency room. The Hospital solidified this proffer when, during the defense case, its health services administrator testified that he had dutifully instructed his staff regarding the fine points of EMTALA compliance. Evidence admitted without limitation can be used by the jury on any issue in the case. *See, e.g., United States v. Castro-Lara*, 970 F.2d 976, 981 (1st Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2935, 124 L.Ed.2d 684 (1993). Here, the policy statement and the executive's testimony, without more, formed a sturdy basis on which the jury could build an eminently reasonable inference that the Hospital considered itself to be – and was – covered by EMTALA.

HSF strives to topple this edifice, contending that the policy statement constituted inadmissible hearsay and that the plaintiffs did not lay a proper foundation for the document's introduction. But in the absence of plain error – and we discern none here – these objections, voiced for the first time on appeal, are deemed to have been waived. *See Suarez-Matos v. Ashford Presbyterian Community Hosp., Inc.*, 4 F.3d 47, 50 (1st Cir.1993); *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1336 (1st Cir.1988); *see also* Fed.R.Evid. 103. Hence, the jury had a rational basis on which to conclude that HSF is among the ninety-nine percent of American hospitals covered by EMTALA.

2. ***Failure to Provide Appropriate Screening.*** Three of the Hospital's remaining four sufficiency-of-the-evidence claims are inextricably intertwined. These three claims are designed to illustrate the purported lack of any foundation for a finding that HSF failed to provide Ms.

Gonzalez with an appropriate screening upon her appearance at the emergency room. The final sufficiency claim is closely related to the first three initiatives. In it, HSF posits that, as long as a hospital is not motivated by crass economic considerations, any failure appropriately to screen does not run afoul of EMTALA. These importunings lack merit.[7]

a.

We begin this analytic segment by laying a straw man to rest. The Hospital asserts that it had no obligation to screen because Ms. Gonzalez did not have an emergency medical condition when she reported to its facility. This theory of defense is doubly flawed. For one thing, EMTALA requires participating hospitals to provide appropriate screening to all who enter the hospitals' emergency departments, whether or not they are in the throes of a medical emergency when they arrive. *See supra* note 5 and accompanying text. For another thing, the record does not compel a conclusion that the decedent's emergency condition developed only after she consulted Dr. Rojas.

Angel Correa testified that he told HSF's receptionist that his mother was experiencing chest pains, and HSF concedes that a patient of Ms. Gonzalez's age who suffered from chest pains would be regarded as having an

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[7] Because we uphold the jury's finding that HSF violated EMTALA when it failed to afford Ms. Gonzalez an appropriate screening, we need not comment upon the jury's finding that HSF also violated EMTALA by improperly transferring Ms. Gonzalez before her condition had stabilized.

emergency medical condition. Yet the Hospital asks us to ignore this evidence in deference to Dr. Rojas's testimony that Ms. Gonzalez did not develop chest pains until some time after she arrived at Hospmed. There is no principled way in which we can accommodate HSF's request. Credibility choices are generally for the jury, not for the court of appeals. *See Cook v. Rhode Island Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 21 (1st Cir.1993). What is more, Dr. Rojas's testimony does not rule out a finding that Ms. Gonzalez exhibited an emergency medical condition when she arrived at HSF. The chest pains might well have spurted and later subsided, or, even if Ms. Gonzalez only complained of nausea and dizziness, that symptomatology (as Dr. Rojas explained) might well herald the onset of an emergency medical condition in the case of a hypertensive diabetic (such as Ms. Gonzalez).

b.

We next assess the Hospital's insistence that it gave Ms. Gonzalez the same (suitable) screening provided to all patients. EMTALA requires an appropriate medical screening, but does not explain what constitutes one. The adjectival phrase is not self-defining. *See Cleland v. Bronson Health Care Group, Inc.*, 917 F.2d 266, 271 (6th Cir.1990) (" 'Appropriate' is one of the most wonderful weasel words in the dictionary, and a great aid to the resolution of disputed issues in the drafting of legislation. Who, after all, can be found to stand up for 'inappropriate' treatment or actions of any sort?"). In the last analysis, appropriateness, like nature, is "a mutable cloud which is always and never the same." Ralph Waldo Emerson, *Essays: First Series* (1841).

Be that as it may, the courts have achieved a consensus on a method of assessing the appropriateness of a medical examination in the EMTALA context. A hospital fulfills its statutory duty to screen patients in its emergency room if it provides for a screening examination reasonably calculated to identify critical medical conditions that may be afflicting symptomatic patients and provides that level of screening uniformly to all those who present substantially similar complaints. *See Baber v. Hospital Corp. of Am.*, 977 F.2d 872, 879 (4th Cir.1992); *Gatewood v. Washington Healthcare Corp.*, 933 F.2d 1037, 1041 (D.C.Cir.1991). The essence of this requirement is that there be some screening procedure, and that it be administered even-handedly.

We add a caveat: EMTALA does not create a cause of action for medical malpractice. *See Gatewood*, 933 F.2d at 1041. Therefore, a refusal to follow regular screening procedures in a particular instance contravenes the statute, *see Baber*, 977 F.2d at 879, but faulty screening, in a particular case, as opposed to disparate screening or refusing to screen at all, does not contravene the statute. *See Brooks v. Maryland Gen. Hosp.*, 996 F.2d 708, 711 (4th Cir.1993). In this case, HSF's delay in attending to the patient was so egregious and lacking in justification as to amount to an effective denial of a screening examination. Thus, we need not decide whether mere negligence in failing to expedite screening would itself violate the federal statute.

To illustrate our point, it should be recalled that HSF prescribed internal procedures which set the parameters for an appropriate screening. HSF's rules, as explicated in

its policy statement, required its emergency room personnel, *inter alia*, promptly to take the vital signs of every patient who visited the facility, to make a written record of all such visits, to treat patients suffering from chest pains as critical cases, and to refer all critical cases to an in-house physician immediately. From the evidence adduced at trial, especially Angel Correa's recollections and the Hospital's utter inability to produce *any* records anent Ms. Gonzalez's visit, the jury reasonably could have inferred that the Hospital did not measure up to the parameters it had established, and that the decedent was denied the screening (monitoring of vital signs, compilation of a written chart, immediate referral to an in-house physician) that HSF customarily afforded to persons complaining of chest pains.

That ends the matter. Bearing in mind that, under EMTALA § 1395dd(a), the same screening examination must be made available to all similarly situated patients, *see Brooks*, 996 F.2d at 710-11; *Baber*, 977 F.2d at 881, the jury's finding that HSF denied Ms. Gonzalez an appropriate screening examination is unimpugnable.

c.

In an allied vein, the Hospital contends that it neither denied Ms. Gonzalez an initial screening nor refused her essential treatment. Its point is that it gave the patient a number, and would have ministered to her had she waited. This contention is spurious.

First, according to Dr. Rojas, HSF referred Ms. Gonzalez to Hospmed. If the jury believed the physician's testimony – and we note, as an aside, that HSF called Dr.

Rojas as its witness – it could well have found that HSF never intended to treat the decedent, or, at the least, was itself responsible for truncating her wait. Second, we think that regardless of motive, a complete failure to attend a patient who presents a condition that practically everyone knows may indicate an immediate and acute threat to life can constitute a denial of an appropriate medical screening examination under section 1395dd(a). Much depends upon circumstances; we recognize that an emergency room cannot serve everyone simultaneously. But we agree with the court below that the jury could rationally conclude, absent any explanation or mitigating circumstances, that the Hospital's inaction here amounted to a deliberate denial of screening. EMTALA should be read to proscribe both actual and constructive dumping of patients.

d.

HSF maintains that depriving a patient of an appropriate screening, in and of itself, will not support an EMTALA claim. It suggests that a hospital can be liable for transgressing the statute only if economic concerns, such as the suspicion that the patient will be unable adequately to pay her way, drive the hospital's actions. Since Ms. Gonzalez had insurance that permitted her hospital visit if an emergency existed, its thesis continues, its handling of her case could not have been motivated by concerns about her ability to pay.[8] As phrased, this

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[8] In all events, this argument is an oversimplification. Especially in the health-care field, all insurance plans are not created equal. Given the bewildering array of coverage

contention raises a question of law, engendering de novo review. *See Foster-Miller, Inc. v. Babcock & Wilcox Can.*, 46 F.3d 138, 147 (1st Cir.1995).

Every court of appeals that has considered this issue has concluded that a desire to shirk the burden of uncompensated care is not a necessary element of a cause of action under EMTALA. *See, e.g., Power v. Arlington Hosp. Ass'n*, 42 F.3d 851, 857 (4th Cir.1994); *Collins v. DePaul Hosp.*, 963 F.2d 303, 308 (10th Cir.1992); *Gatewood*, 933 F.2d at 1040.[9] We think that these cases are correctly decided, and that EMTALA does not impose a motive requirement. The decision on which the Hospital relies, *Nichols v. Estabrook*, 741 F.Supp. 325 (D.N.H.1989), did not involve failure to screen, but merely a misdiagnosis. We hold, therefore, that EMTALA, by its terms, covers all patients who come to a hospital's emergency department, and requires that they be appropriately screened, regardless

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conditions, deductibles, reimbursement rates, and the like, sophisticated but esurient providers have ample provocation to discriminate not only between insured and uninsured patients but also among patients who are insured under different plans.

[9] In *Cleland*, the Sixth Circuit held, as have other courts, that a fear of nonpayment is not essential to triggering an EMTALA claim. *See* 917 F.2d at 272. *Cleland* is different, however, in that the court required there to be *some* motive – whether or not economic – for the disparate treatment. *See id.* Other courts have declined to follow the Sixth Circuit's lead in this respect, *see, e.g., Gatewood*, 933 F.2d at 1041 n. 3, and we agree that the range of improper motives available under the *Cleland* standard "is so broad as to be no limit at all, and as a practical matter amounts to not having a motive requirement." *Power*, 42 F.3d at 857.

of insurance status or ability to pay. *See* 42 U.S.C. § 1395dd(a).

B. *New Trial.*

We turn now to the Hospital's complaint that the lower court erred in declining to honor its motion for an unconditional new trial. Our reexamination of this ruling is extremely circumscribed. Principally because the trial judge saw and heard the witnesses in the raw, his refusal to uproot a jury verdict may only be reversed for abuse of discretion. *See Quinones-Pacheco v. American Airlines, Inc.*, 979 F.2d 1, 3 (1st Cir.1992); *Veranda Beach Club Ltd. Partnership v. Western Sur. Co.*, 936 F.2d 1364, 1384 (1st Cir.1991). This means, in effect, that an appellate court may set aside such a ruling only if it determines that "the verdict is against the demonstrable weight of the credible evidence or results in a blatant miscarriage of justice." *Sanchez*, 37 F.3d at 717.

Refined to bare essence, HSF's claim is that, even if the plaintiffs introduced enough proof to withstand judgment as a matter of law, the verdict defied the weight of the trustworthy evidence. In support, the Hospital reiterates the points previously discussed, terming the evidence asthenic as to HSF's status under EMTALA and as to its purported violations of the law.

We will not repastinate the ground that we ploughed earlier in this opinion. The evidence regarding the relationship of EMTALA to HSF, *see supra* Part IV(A)(1), strikes us as rather persuasive, especially since HSF – which could have supplied a foolproof answer from its own records – offered nothing to suggest that it did not

welcome Medicare patients. As to the other points, *see supra* Part IV(A)(2), the jury heard testimony from which it could have concluded that Ms. Gonzalez went to the Hospital in critical condition and received only a high number and a cold shoulder. Angel Correa's credibility emerged relatively unscathed from cross-examination; we cannot fault the jury either for crediting his recollection or for concluding that the Hospital denied Ms. Gonzalez any vestige of an appropriate screening.

To be sure, the evidence in this case is not particularly precise. But facts at trial, as in life, do not always appear in black and white. Juries and judges frequently must distinguish between manifold shades of gray. The limited review that we can conduct convinces us that the grays predominate here, that the jury's finding of EMTALA liability is within the spectrum of acceptable outcomes, and that the trial judge did not abuse his discretion in refusing to paint over the jury's collective judgment. No more is exigible. *See Freeman*, 865 F.2d at 1333-34 ("The mere fact that a contrary verdict may have been equally – or even more easily – supportable furnishes no cognizable ground for granting a new trial. If the weight of the evidence is not grotesquely lopsided, it is irrelevant that the judge, were he sitting jury-waived, would likely have found the other way.").

C. *Damages.*

On the final leg of our journey, we traverse the Hospital's two challenges to the award of damages. In substance, HSF maintains (a) that the plaintiffs may recover under EMTALA only those damages stemming from the

decedent's pain and suffering, and (b) that in all events, the jury exhibited excessive generosity. These challenges must be considered separately for they evoke differing legal principles and standards of review.

1. ***Recoverable Damages.*** Since questions such as whether a statute authorizes damages in particular instances or in favor of particular parties are quintessentially legal in nature, we afford de novo review. *See EEOC v. Bank of Billings*, 758 F.2d 397, 401 (9th Cir.), *cert. denied*, 474 U.S. 902, 106 S.Ct. 228, 88 L.Ed.2d 228 (1985); *see also Strickland v. Commissioner, Me. Dep't of Human Servs.*, 48 F.3d 12, 16 (1st Cir.1995). HSF's claim that the plaintiffs cannot recover damages under EMTALA for their own pain, suffering, and anguish falls into this category. Undertaking de novo review, we conclude that this claim is voiced too late and augurs too little.

The chronology of the case speaks volumes about the lack of timeliness. HSF first had the opportunity to assert this defense in its answer to the plaintiffs' complaint, but did not do so. In its submissions ancillary to both the initial scheduling conference and the pretrial conference, *see* Fed.R.Civ.P. 16, HSF likewise omitted any reference to the defense. The latter omission is especially significant. The pretrial conference is an important event in the life of a litigated case. It is designed to assist the court in "formulati[ng] . . . the issues, including the elimination of frivolous claims or defenses." Fed.R.Civ.P. 16(c)(1). Along the same line, the pretrial order is intended to shape the contours of the ensuing trial by setting forth the legal theories upon which the parties intend to rely. *See* D.P.R.Loc.R. 314.3(E). Here, HSF undermined these mechanisms. It failed to assert the defense at the pretrial

conference, and, consequently, the pretrial order, signed by all counsel and entered by the district court, made no mention of any contention that EMTALA barred recovery for the heirs' anguish and suffering.

The Hospital's neglect continued up to, and through, the trial proper. In its trial brief, HSF enumerated only three legal issues to be considered at trial. None of these dealt with the question of whether persons other than patients (or those suing in a patient's behalf) could recover damages under EMTALA. At the close of the plaintiffs' case, HSF unsuccessfully moved for judgment as a matter of law, *see* Fed.R.Civ.P. 50(a), but without calling the court's attention to the alleged impropriety of compensating the plaintiffs for their own pain and suffering. At the close of all the evidence, the Hospital renewed its Rule 50(a) motion, but did not add any new grounds. To cinch matters, the Hospital eschewed any objection to the trial court's inclusion of the plaintiffs' claims for their own pain, suffering, and mental anguish in the verdict forms and the jury instructions. This was a waiver, pure and simple. *See* Fed.R.Civ.P. 49(a), 51; *see also Putnam Resources v. Pateman*, 958 F.2d 448, 456 (1st Cir.1992) ("Silence after instructions, including instructions on the form of the verdict to be returned by the jury, typically constitutes a waiver of any objections.").

Based on this somber record of inattention, we hold that HSF forfeited the theory of defense that it now espouses. In reaching this conclusion, we give special weight to the Hospital's boycott of the final pretrial order. That order is intended to "control the subsequent course of the action," and can be modified only "to prevent manifest injustice." Fed.R.Civ.P. 16(e). An appellate court

should not lightly relieve a litigant from the condign consequences of its failure to list a theory of defense at that critical stage of the proceedings. *See, e.g., Ramirez Pomales v. Becton Dickinson & Co.*, 839 F.2d 1, 3 (1st Cir.1988) (explaining that issues not included in the final pretrial order are generally waived). If pretrial orders are to achieve their intended purpose, "courts and litigants must ordinarily take them seriously." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 999 (1st Cir.1990), *cert. denied*, 499 U.S. 912, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991).

While waivers are sometimes overlooked on appeal, none of the possible routes around HSF's waiver are passable. The suggestion that the Rule 50(a) motion preserved the defense is little short of jejune. A motion for judgment as a matter of law made at the close of all the evidence preserves for review only those grounds specified at the time, and no others. *See Sanchez*, 37 F.3d at 723; *Sweeney v. Westvaco Co.*, 926 F.2d 29, 37 (1st Cir.), *cert. denied*, 502 U.S. 899, 112 S.Ct. 274, 116 L.Ed.2d 226 (1991). By the same token, the suggestion that HSF's post-trial motion for judgment notwithstanding the verdict – a motion in which HSF for the first time made a claim that EMTALA did not authorize a recovery by the plaintiffs for their own pain, suffering, and anguish – saves the day is equally unavailing. Indeed, this motion is a classic example of a litigant locking the barn door long after the horse has bolted. As the name implies, a renewed motion for judgment as a matter of law under Fed.R.Civ.P. 50(b) is bounded by the movant's earlier Rule 50(a) motion. The movant cannot use such a motion as a vehicle to introduce a legal theory not distinctly articulated in its

close-of-evidence motion for a directed verdict. *See Sanchez*, 37 F.3d at 723; *Perdoni Bros., Inc. v. Concrete Sys., Inc.*, 35 F.3d 1, 3 (1st Cir.1994); *Systemized of New Eng., Inc. v. SCM, Inc.*, 732 F.2d 1030, 1035-36 (1st Cir.1984); *see also* James W. Moore, 5A *Moore's Federal Practice* ¶ 50.08 (2d ed. 1994) (explaining that a motion for judgment after the verdict under Rule 50(b) "may only be premised upon particular grounds raised in the earlier motion made at the close of all the evidence," and that, accordingly, "any argument omitted from the motion made at the close of the evidence is waived as a ground for judgment under Rule 50(b)").

The last possibility that we consider relates to the reality that the raise-or-waive rule (like virtually all subsets of the plain error principle) admits of an occasional exception in the interests of justice. Thus, the court of appeals has discretion to relieve a party from the normal consequences of failure to proffer a defense in a timeous manner. *See United States v. La Guardia*, 902 F.2d 1010, 1013 (1st Cir.1990) (holding that "an appellate court has discretion, in an exceptional case, to reach virgin issues"); *accord Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976); *United States v. Krynicki*, 689 F.2d 289, 291-92 (1st Cir.1982). But the exceptions are few and far between, and appellate discretion should not be affirmatively exercised unless error is plain and the equities heavily preponderate in favor of correcting it. To meet this benchmark, the omitted argument ordinarily will have to be "highly persuasive," and declining to reach it will have to portend "a miscarriage of justice."

Krynicki, 689 F.2d at 292. Taking into account the dimensions of this obstacle, we discern no compelling basis for invoking this court's discretion.

EMTALA looks to state law, broadly defined to include Puerto Rico law, *see* 42 U.S.C. §§ 410(h), 1395x(x), anent the availability of damages. It contains the following instruction:

> Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located. . . .

42 U.S.C. § 1395dd(d)(2). HSF's argument in effect proposes that we construe the words "individual" and "direct" as denoting the patient herself, and no one else. But this is only one of two possible constructions of the statute. It is equally open to read the law as permitting an individual who has a special relationship with another – say, a wife deprived of consortium or, as here, a bereaved relative – to sue when she is harmed in direct consequence of an EMTALA violation inflicted upon such other. When death results, this reading would naturally extend the statutory prerogative to individuals who are eligible to bring survivors' actions under local law. *See, e.g., Lane v. Calhoun-Liberty County Hosp. Ass'n, Inc.*, 846 F.Supp. 1543, 1553 (N.D.Fla.1994) (permitting claimants to recover those damages available to survivors under Florida law); *Griffith v. Mount Carmel Med. Ctr.*, 842 F.Supp. 1359, 1365 (D.Kan.1994) (affirming award of damages to wife and children of a decedent).

Since both readings are superficially plausible, we cannot say it was plain error for the lower court, in the absence of any timely objection, to interpret the statute generously, thus providing remediation for the decedent's heirs comparable to that which they would ordinarily receive under local law. *See Widow of Delgado v. Boston Ins. Co.*, 101 P.R. Dec. 598, 599-60 (1 Official Translation 824, 825) (1973) (explaining that the heirs of a person who died through another's negligence have claims both for their own suffering and the suffering of the decedent).

2. ***Excessiveness.*** HSF's final storming of the barricades consists of a frontal attack on the amount of the jury's award and a flanking attack on Judge Perez-Gimenez's decision not to trim it. Both determinations are reviewable under an abuse-of-discretion rubric. *See, e.g., Segal v. Gilbert Color Sys., Inc.*, 746 F.2d 78, 81 (1st Cir.1984).

This aspect of the case centers around the size of the aggregate damage award. Excessiveness, like beauty, is often in the eye of the beholder. Accordingly, the case law instructs that a damage award must endure unless it is "grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand." *Id.* at 80-81 (quoting *Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156, 159 & n. 4, 89 S.Ct. 331, 333 & n. 4, 21 L.Ed.2d 309 (1968); internal quotation marks omitted). An appellate court's normal disinclination to second-guess a jury's evaluation of the proper amount of damages is magnified where, as here, the damages entail a monetary valuation of intangible losses, and the trial judge, having seen and heard the witnesses

at first hand, accepts the jury's appraisal. *See Ruiz v. Gonzalez Caraballo*, 929 F.2d 31, 34 (1st Cir.1991).

Measured by this standard, the verdicts in favor of the survivors are beyond reproach. Puerto Rico law permits certain close relatives to bring suits of this type without requiring a showing of physical injury or economic loss. *See* P.R.Laws Ann. tit. 31, § 5141 (1990); *see also LaForest v. Autoridad de Las Fuentes Fluviales*, 536 F.2d 443, 444-45 (1st Cir.1976) (applying Puerto Rico law and allowing wrongful death action by the decedent's parents and siblings); *Burke v. Compagnie Nationale Air France*, 699 F.Supp. 1016, 1018 (D.P.R.1988) (explaining that, under Puerto Rico's Civil Code, "mental suffering is generally just as compensable as physical harm").

Here, the plaintiffs presented both lay testimony and expert opinion evidence regarding their pain, suffering, and mental anguish (past, present, and future). The testimony indicated that the decedent was a matriarchal figure who functioned as the hub of the family circle. Her son, Angel, lived with her; her two daughters, Gloria and Esther, resided nearby; her deceased son's four children – who lost their father a mere five months before their grandmother perished – dwelt in her home for much of their lives. The plaintiffs' expert testified that all three of Ms. Gonzalez's children suffered depression in the wake of their mother's death; and that the four grandchildren experienced sadness, suffering and the like that would take up to five years to abate.

At trial, HSF neither rebutted this testimony in kind nor effectively impeached it. On appeal, HSF sends up a smoke screen, resorting to highly questionable practices.

Citing authority out of context, and neglecting to insert ellipses to signify textual omissions – its citation of *Ruiz*, 929 F.2d at 34, as "authority" for a proposition exactly the opposite of what the case holds is a prime example – HSF strains to carry the heavy burden inherent in challenging a jury's award of damages for noneconomic loss. We find its argument to be both disingenuous and unpersuasive.

Objectively considered, the record easily supports the jury's assessment of damages in favor of the offspring. It is hard to doubt that the plaintiffs suffered when the woman described by one witness as the trunk of the family tree was cut down. The open question involves the difficult chore of translating their pain, suffering, and anguish into dollars. This is a matter largely within the jury's ken. *See id.* Taking into account the expert's testimony and the evidence of the close-knit family structure, the sums awarded do not shock – or even vellicate – our collective conscience.

This leaves the $200,000 awarded to the heirs on account of Ms. Gonzalez's pain and suffering. Though generous, the jury's assessment does not outstrip the bounds of reason. Due to the Hospital's failure to provide even the most rudimentary screening, Ms. Gonzalez spent the few remaining hours of her life in agony, beset by nausea, dizziness, and chest pains. It is hard to imagine – let alone to quantify in dollars – the sheer terror that she must have felt while waiting for medical attention that never came.

Although HSF mounts a series of arguments crafted to cast doubt upon the size of the verdict, these arguments are unpersuasive. This case, in which the decedent's travails extended over a period of several hours, is unlike cases involving sudden death in which a decedent's pain and suffering is limited to a few seconds or, at most, a matter of minutes. *See, e.g., Bonn v. Puerto Rico Int'l Airlines, Inc.*, 518 F.2d 89, 94 (1st Cir.1976). By like token, merely showing that the damage award is generous in comparison to other (hand-picked) cases is insufficient to warrant relief. *See Havinga v. Crowley Towing & Transp. Co.*, 24 F.3d 1480, 1488-89 (1st Cir.1994). Finally, it is beside the point that judges in the commonwealth courts frequently award lesser sums in wrongful death actions. While EMTALA refers to local law to determine the scope of damages, *see* 42 U.S.C. § 1395dd(d)(2), this requirement does not override the general rule that "[a] federal jury . . . is not bound in making its determination by the amount that the Commonwealth courts have awarded or approved." *LaForest*, 536 F.2d at 446-47.

To recapitulate, converting feelings such as pain, suffering, and mental anguish into dollars is not an exact science. The jury is free "to harmonize the verdict at the highest or lowest points for which there is a sound evidentiary predicate, or anywhere in between . . . so long as the end result does not . . . strike such a dissonant chord that justice would be denied were the judgment permitted to stand." *Milone v. Moceri Family, Inc.*, 847 F.2d 35, 37 (1st Cir.1988). Here, we do not find the damages assigned by the jury to cross the outer limit of the wide universe of acceptable awards. In sum, the damage award in the

heirs' favor is neither legally inappropriate nor so excessive as to necessitate a remittitur.[10]

V. CONCLUSION

We need go no further. HSF has not presented arguments capable of overcoming the formidable hurdles it faces in challenging either the liability determination or the damage assessment of a properly instructed jury. The judgment below must therefore be *Affirmed.*

APPENDIX

EMTALA Excerpts

> In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under [Medicare]), comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.

42 U.S.C. § 1395dd(a).

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[10] Our endorsement of the damages, including the award to the heirs for the decedent's pain and suffering, is fortified by the trial judge's unconditional seal of approval. *See Ruiz*, 929 F.2d at 34.

> If any individual (whether or not eligible for benefits under [Medicare]) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either –
>
> > (A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or
> >
> > (B) for transfer of the individual to another medical facility in accordance with subsection (c) of this section.

42 U.S.C. § 1395dd(b)(1).

> If an individual at a hospital has an emergency medical condition which has not been stabilized (within the meaning of subsection (e)(3)(b) of this section), the hospital may not transfer the individual unless –
>
> > (A)(i) the individual (or a legally responsible person acting on the individual's behalf) after being informed of the hospital's obligations under this section and of the risk of transfer, in writing requests transfer to another medical facility [, or]
> >
> > (ii) a physician . . . has signed a certification that based upon the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual . . . and

> (B) the transfer is an appropriate transfer . . . [as defined *infra*].

42 U.S.C. § 1395dd(c)(1).

> An appropriate transfer to a medical facility is a transfer –
>
> (A) in which the transferring hospital provides the medical treatment within its capacity which minimizes the risks to the individual's health . . . ;
>
> (B) in which the receiving facility –
>
> (i) has available space and qualified personnel for the treatment of the individual, and
>
> (ii) has agreed to accept transfer of the individual and to provide appropriate medical treatment;
>
> (C) in which the transferring hospital sends to the receiving facility all [relevant] medical records . . . ; [and]
>
> (D) in which the transfer is effected through qualified personnel and transportation equipment, as required including the use of necessary and medically appropriate life support measures during the transfer. . . .

42 U.S.C. § 1395dd(c)(2).

> A participating hospital that negligently violates a requirement of this section is subject to a civil monetary penalty of not more than $50,000 . . . for each such violation.

42 U.S.C. § 1395dd(d)(1)(A).

Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

42 U.S.C. § 1395dd(d)(2)(A).

The term "emergency medical condition" means . . .

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in –

(i) placing the health of the individual . . . in serious jeopardy,

(ii) serious impairment to bodily functions, or

(iii) serious dysfunction of any bodily organ or part. . . .

42 U.S.C. § 1395dd(e)(1)(A).

A participating hospital may not delay provision of an appropriate medical screening examination required under subsection (a) of this section or further medical examination and treatment required under subsection (b) of this section in order to inquire about the individual's method of payment or insurance status.

42 U.S.C. § 1395dd(h).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

GLORIA IVETTE CORREA GONZALEZ, Plaintiff	*	Civ. No. 92-2240(PG)
v.	*	
HOSPTIAL SAN FRANCISCO, et al., Defendants	*	

OPINION AND ORDER

The matter before the Court is defendant Hospital San Francisco's (Hospital S.F.) post-verdict motion for judgment as a matter of law under Fed. R. Civ. P. 50(b) alleging that the evidence at trial was legally insufficient to prove a claim under the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. 1395dd. For the same reason, defendant moves for a new trial pursuant to Fed. R. Civ. P. 59 and/or for *remittitur.*

The case arises out of events surrounding the treatment of decedent, Mrs. Carmen Gloria González, at Hospital S.F. on September 6, 1991.

Plaintiffs, as personal representatives of the estate of decedent, and in their personal capacity, filed their complaint for damages for violations of EMTALA. The violations consist in defendant Hospital S.F.'s failure: (1) to provide an appropriate medical screening examination of plaintiff decedent as required by EMTALA and (2) to stabilize decedent's emergency medical condition before transferring her in compliance with EMTALA.

A jury trial was held on May 9, 1994. The jury found: (1) that decedent went to Hospital S.F.'s emergency room on September 6, 1991, and decedent or someone on her behalf made a request for examination or medical treatment; (2) that Hospital S.F., on September 6, 1991, was a participating hospital as defined in EMTALA: (3) that Hospital S.F. did not provide Mrs. González with an appropriate medical screening examination; (4) that Mrs. González had an emergency medical condition as defined by EMTALA; (5) that she was transferred before the medical emergency was stabilized; and (6) that plaintiffs suffered damages as a result of Hospital S.F.'s conduct. The jury awarded damages in the sum of $700,000.00: $200,000.00 to decedent's daughter and $500,000.00 to decedent's grandchildren.

Defendant asserts that the verdict should be set aside or in the alternative that it is entitled to a new trial on various grounds. Initially, the Court notes the standard established in order to grant a judgment as a matter of law, which is that the evidence must be such that a reasonable person could be led to only one conclusion, that the moving party is entitled to judgment. *Davet v. Maccarone*, 973 F.2d 22, 28 (1st Cir. 1992), (*Citing Luson International Distributors, Inc. v. Fabricating and Production Machinery, Inc.*, 966 F.2d 9 (1st Cir. 1992); *Putnam Resources v. Pateman*, 958 F.2d 448, 459 (1st Cir. 1992); *Hendricks & Assoc., Inc. v. Daewoo Corp.*, 923 F.2d 209, 214 (1st Cir. 1991) (and cases cited therein); Fed. R. Civ. p. 50(b). This determination must be made without assessing the credibility of the witnesses, without evaluating the weight of the evidence and without attempting to resolve conflicts in the testimony. The trial court must view all the facts

and reasonable inferences to be drawn therefrom in the light most favorable to the non-movant.

As to a motion for new trial, "[a] trial judge may not grant a motion for a new trial merely because he or she might have reached a conclusion contrary to that of the jurors, rather, the trial judge may set aside a jury's verdict only if he or she believes that the outcome is against the clear weight of the evidence such that upholding the verdict will result in a miscarriage of justice." *Putnam Resources v. Pateman*, 958 F.2d at 459 (*citing Conway v. Electro Switch Corp.*, 825 F.2d 593, 598-99 (1st Cir. 1987).

When an argument that the evidence was insufficient forms the basis of a motion for new trial, the district court is generally within the bounds of its discretion in denying the motion using the same reasoning as in its denial of a motion for judgment as a matter of law. *Lama v. Borras*, 16 F.3d 473, 477 (1st Cir. 1994).

The Court will review the grounds raised by defendant under Rule 50(b) conterminous with those raised under Rule 59. Those grounds are the following: (1) plaintiffs failed to present sufficient evidence to establish jurisdiction under EMTALA; (2) plaintiffs failed to meet their legal burden of proof under the Act; and (3) damages awarded by the jury are legally inappropriate.

Jurisdiction Under EMTALA

Defendant claims that plaintiffs failed to establish jurisdiction under EMTALA in two ways. First, that plaintiffs failed to allege and prove that decedent, Mrs. González, was not screened and stabilized due to her

financial resources; that to the contrary, Hospital S.F. presented evidence to the effect that decedent was medically insured. Second, that plaintiffs failed to prove that Hospital S.F. was a participating hospital as defined by EMTALA.

EMTALA was passed by Congress in 1986 in response to a growing concern that hospitals were "dumping" patients unable to pay, by either refusing to provide emergency medical treatment or transferring patients before their emergency conditions were stabilized. *Brooks v. Maryland General Hosp., Inc.*, 996 F.2d 708, 710 (4th Cir. 1993).

EMTALA imposes two duties on every hospital that has both a medicare provider agreement with the Secretary of Health and Human Services and an emergency room or department: (1) to provide to anyone presented for treatment "an appropriate medical screening . . . to determine whether or not an emergency medical condition . . . exists," and (2) to stabilize the condition or, if medically warranted to transfer the person to another facility of the benefit of transfer outweighs its risks. 42 U.S.C. § 1395dd(a)-(c). A person injured by a breach of these duties may recover "those damages available for personal injury under the law of the State in which the hospital is located. 42 U.S.C. § 1395dd(d)(2)(A).[1] *Id.*

---

[1] Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the state in which the hospital is located, and such equitable relief as is appropriate. 42 U.S.C. § 1395dd(d)(2)(A).

The first jurisdictional issue raised by defendant has been answered as follows:

> While it appears that EMTALA was enacted because of Congress' concern about the growing practice of hospitals "dumping" emergency room patients who had no insurance and could not afford to pay, the language of the Act does not require a showing that claimant is uninsured or indigent, nor does it provide that the hospital breaches the Act's duties only when it acts with economic motives. Rather, the language of the Act imposes its duties in respect of "any individual" who is presented to an emergency room for examination or treatment of a medical condition. See 42 U.S.C. § 1395dd(a) & (b). . . .

Brooks, 996 F.2d at 711 n.4, *reaffirmed in Power v. Arlington Hospital Assoc.*, ___ F.3d ___, 1994 WL 688266 (4th Cir. 1994). *See also Gatewood v. Washington Healthcare Corp.*, 933 F.2d 1037, 1041, (D.C.Cir. 1991).

The second issue raised as to EMTALA's jurisdiction is also without merit. Hospitals covered by EMTALA are hospitals with emergency departments that have entered into a medicare provider agreement with the Secretary of Health and Human Services. *Miller v. Medical Center of Southwest Louisiana*, 22 F.3d 626 (5th Cir. 1994). Plaintiffs introduced as evidence to prove the above a document written and signed in the year 1991 by the Board Chairman and Administrator of Hospital S.F., Arturo Cadillo, Jr., Md., as to the institutional policy in regards to compliance with EMTALA. (Joint Exhibit IV). It reads:

> The Medical Faculty of San Francisco Hospital, as well as the San Francisco Hospital Administration hereby reaffirm their position that as a

> general rule no patient in unstable condition (whether pregnant or not) shall be discharged, transferred, or discontinued treatment unless the necessary arrangements have been made for compliance with the "COBRA" Act, 42 U.S.C. section 1395dd (1990), whichever are applicable.

Hospital S.F.'s own witness, Mr. Domingo Nevárez, Health Service Administrator, testified that he instructed his staff regarding compliance with EMTALA. Dr. David Noteman, plaintiff's emergency medical expert testified that approximately 99% of the hospitals in the United States are covered under EMTALA. Hospital S.F. had the opportunity to present evidence to the contrary and chose not to do so allowing a presumption that additional evidence would have been prejudicial to its case.

Viewing the evidence in the light most favorable to the non-movant, the plaintiffs, the jury could have reasonably infer that Hospital S.F. was a hospital covered by EMTALA on September 6, 1991.

Verdict Contrary to Plaintiff's Proof on EMTALA Claims

Defendant argues that it did screen the decedent and following their own establish rules and regulations proceeded with the referral of decedent to Hosp. Med. Organizados.

The requirement that hospitals provide "an appropriate medical screening" is found in section 1395dd(a):

> In the case of a hospital emergency department, if any individual (whether or not eligible for benefits under [medicare]) comes to the emergency department and a request is made on the individual's behalf for examination or treatment

> for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition exists.

While this section requires a hospital's emergency department to provide an "appropriate medical screening examination," it does not define that term other than to state its purpose is to identify an "emergency medical condition." *Baber v. Hospital Corp. of America*, 977 F.2d 872, 879 (4th Cir. 1992), *Citing Cleland v. Bronson Health Care Group, Inc.*, 917 F.2d 266, 271 (6th Cir. 1990) (referring to "appropriate" as "one of the most wonderful weasel words in the dictionary").

An "emergency medical condition" is defined as:

> a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in – (i) placing the health of the individual . . . in serious jeopardy; (ii) serious dysfunction of any bodily organ or part. 42 U.S.C.A. § 1395dd(e)(1)(A).

Therefore, the court in Baber concluded that the goal of "an appropriate medical screening examination" is to determine whether a patient with acute or severe symptoms has a life threatening or serious medical condition. The plain language of the statute requires a hospital to

develop a screening procedure[2] designed to identify such critical conditions that exist in symptomatic patients: and to apply that screening procedure uniformly to all patients with similar complaints.

Hospital S.F. did have a screening procedure designed to: identify an emergency medical condition. The procedure is contained in the "Manual of Norms and Procedures for the Emergency Room." As to the initial evaluation, the document provides that:

> Every patient is to be interviewed by a Registered Nurse who is to interview the patient and establish treatment priority in accordance with the patient's condition. His/her vital signs will subsequently be taken by a Registered Nurse who is to determine if the patient is to wait or if he needs immediate attention. The following conditions are examples of conditions that need priority:
>
> 1. Chest pains
>
> . . .
>
> 9. Vomiting and/or diarrhea.

---

[2] While a hospital emergency room may develop one general procedure for screening all patients, it may also tailor its screening procedure to the patient's complaints or exhibited symptoms. . . . Under our interpretation of EMTALA such varying screening procedures would not pose liability under EMTALA as long as all patients complaining of the same problem or exhibiting the same symptoms receive identical screening procedure. We also recognize that the hospital's screening procedure is not limited to personal observation and assessment but may include ancillary services through departments such as radiology and laboratory. 977 F.2d at 879 n.6.

> This patient, or his relative, is sent to get registered. . . .

In relation to the taking of vital signs, the document provides as a norm that "[e]very patient who arrives at the Emergency Room is to have his vital signs taken routinely,. . . . The purpose is to [m]aintain constant observation of the vital signs of the clients and evaluate them promptly for significant changes." The procedure established at Hospital S.F. is:

> 1. Upon the client arriving at the Emergency Room his/her vital signs are immediately taken and he/she is evaluated.
>
> 2. After being evaluated, the frequency with which they are to be taken is determined. . . .

The only evidence presented by defendant is the testimony of nurse Gloria Benitez. She stated that she was in charge of making the initial screening at Hospital S.F. and that when no emergency was apparent, if it is a patient insured by Hosp. Med. Organizados (C.C.S.C.A.), she proceeded to call C.C.S.C.A. to check whether the medical plan wanted the patient to be treated or to be transferred to them.

Mrs. Gonzalez's son testified that they arrived at the emergency room of Hospital S.F., where he repeatedly told the receptionist about his mother's symptoms, nausea, chest pains and cold sweating, and requested emergency treatment. He also testified that the only thing that Hospital S.F. did was take Mrs. González's insurance, information.

There are no hospital records that decedent was interviewed by a registered nurse or that her vital signs

were taken in order to determine whether the patient needed immediate attention. Evidence was presented that decedent had on previous occasions visited the emergency room at Hospital S. F. with similar complaints. Emergency room records show that she was interviewed and given appropriated medical screening within the capability of Hospital S.F., including ancillary services such as an electrocardiograph report. The records show that Mrs. González had a history of high blood pressure and diabetes mellitus.

The critical element of an EMTALA cause of action is not the adequacy of the screening examination but whether the screening examination that was performed deviated from the hospital's customary procedures for evaluating a patient in a similar condition. *Baber v. Hospital Corp. of America*, 977 F.2d at 881.

In the present case, the evidence seen in the light most favorable to the plaintiffs allowed the jury to at least concluded that Hospital S.F. failed to provide Mrs. González with an appropriate medical screening examination in accordance with its standard screening procedures. Any departure from standard screening procedures constitutes inappropriate screening in violation of EMTALA, *Gatewood v. Washington Healthcare Co.*, 933 F.2d at 1041.

The Court need not address the scope of the stabilization and transfer provisions of EMTALA, subsections 1395dd(b) and (c), for those provisions are triggered only after a hospital determines that an individual has an emergency condition. *See* 42 U.S.C.§ 1395dd(b)(1)(c).

Legally Inappropriate Damages

Plaintiffs seek damages for their own pain and suffering as a result of their mother and grandmother's death. hospital S.F. claims that "only the patient (or if deceased his or her estate) and no third parties can recover damages under the Act" and that "assuming [a]rguendo that a recovery in damages is warranted, . . . only those damages which the decedent transferred as part of her estate can stand."

Under the EMTALA, "any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against a participating hospital, obtain those damages available for personal injury under the law of the state in which the hospital is located,and such equitable relief as is appropriate." 42 U.S.C.A. § 1395dd(d)(2)(A) Courts have uniformly recognized that persons having standing to sue under state law may sue under EMTALA. *See, e.g., Green v. Touro Infirmary,* 992 F.2d 537, 538 (5th Cir. 1993); *Collins v. De Paul Hospital,* 963 F.2d 303 (10th Cir. 1992); *Gatewood v. Washington Healthcare Corp., supra; Lane v. Calhoun-Liberty County Hosp. Ass'n, Inc.,* 846 F. Supp. 1543, 1553 (N.D.Fla. 1994). Substantive Puerto Rico law on wrongful death and personal injury governs the award of damages under EMTALA. *Id.* Puerto Rico law permits plaintiffs to recover damages for their pain and suffering resulting from their mother's and grandmother's death. *Vda.de Delgado v. Boston Insurance,* 101 D.P.R. 598, 599-600 (1973).

Excessiveness of Jury's Verdict

Hospital S.F. requests a *remittitur* for allegedly excessive damages award granted by the jury. Plaintiffs' claim under EMTALA "does not rest on any proof that the hospital was negligent; it is predicated on the hospital's violation of a *federal* statute making the hospital strictly liable for any 'personal harm' that 'directly results' from that violation. (Emphasis on original). 42 U.S.C. § 1395dd(d)(2)(A)." *Griffith v. Mt Carmel Medical Center*, 842 F. Supp. 1359, 1365 (D.Kan. 1994). The jury determined that Mrs. González's heirs were entitled to $200,000.00 for decedent's pain, suffering and mental anguish and that Mrs. González's children and her grandchildren were entitled to $500,000.00 for their own deep moral suffering and anguish, damages available for personal injury under the laws of Puerto Rico.

In *Griffith*, the district court reviewed the law generally applicable to new trial motions and motions for *remittitur* based on the excessiveness of a jury's verdict. The Court stated:

> Fundamentally, it is the *jury's* job to decide damages. The jury "is clothed with a wide latitude and discretion in fixing damages pursuant to the court's instructions, deemed proper to fairly compensate the injured party." *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1559 (10th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1941, 118 L.Ed.2d 547 (1992) (quoting *Bennett v. Longacre*, 774 F.2d 1024 (10th Cir.1985)). Nevertheless, if the amount of a jury's damages award is "so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause

invaded the trial," the court must order a new trial. *Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152, 1168 (10th Cir.1981) *en banc*) (plurality opinion), *cert. denied*, 464 U.S. 824, 104 S.Ct. 92, 78 L.Ed.2d 99 (1983). That is, if the court finds that a jury's damages award is excessive and that that excessiveness was a result of passion, prejudice or other improper cause, then a new trial *must* be granted. *Mason*, 948 F.2d at 1560-61. On the other hand, if the court finds the damages award to be excessive, but not the result of passion, prejudice, or other improper cause, the court *may* order a complete new trial, order a new trial limited to the issue of damages, or condition the denial of a motion for new trial on plaintiff's acceptance of a *remittitur*. 11 C. Wright, A. Miller & F. Elliott, *Federal Practice and Procedure* § 2815; *Mason*, 948 F.2d at 1560-61; *Malandris*, 703 F.2d at 1168; *Courtney v. Safelite Glass Corp.*, 811 F.Supp. 1466, 1472 (D.Kan.1992); *Foster v. Bd. of Trustees of Butler Cty. Com. Col.*, 771 F.Supp. 1122, 1126-27, 1132-33 (D.Kan.1991). To order a new trial on damages only, the court must be satisfied that the verdict did not represent a compromise among jurors and that any errors on the damages issue have not affected the determination of liability. *Mason*, 948 F.2d at 1552 (quoting 11 C. Wright, A. Miller & F. Elliott, *Federal Practice and Procedure*, § 2814). The decision whether to grant a *remittitur* is governed by federal law, *Royal College Shop, Inc. v. Northern Ins. Co.*, 895 F.2d 670, 677 (10th Cir. 1990), and, as with a new trial, rests within the broad discretion of the trial court. *Garrick v. City and County of Denver*, 652 F.2d 969, 971 (10th Cir. 1981).

842 F. Supp. at 1365-66. *See also Wagenmann v. Adams*, 829 F.2d 196 (215) (1st Cir. 1987) (*quoting Segal v. Gilbert Color Systems, Inc.*, 746 F.2d 78, 81 (1st Cir. 1984) ("a jury's judgment regarding the appropriate damage award is given wide latitude and will be upheld so long as it does not exceed "any rational appraisal or estimate of the damages that could be based on the evidence before the jury.").

A jury verdict is not reversed for excessiveness except on the strongest of showings.

> The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to "shock the judicial conscience," "so gross or inordinately large as to be contrary to right reason," so exaggerated as to indicate "bias, passions, prejudice, corruption, or other improper motive," or as "clearly exceed[ing] that amount any reasonable man could feel the claimant entitled to."

Nydam v. Lennerton, 948 F.2d 808, 810 (1st Cir. 1991) (*citing Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir.,1983).

This standard of review of damage awards places an enormous burden on the party challenging the award. *Feldzguez v. Figueroa-Gómez*, 996 F.2d 425, 428 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 553, (1993).

Viewing the evidence in the light most favorable to plaintiffs, *McDonald Federal Lab, Inc.*, 724 F.2d 243, 246 (1st Cir. 1984) (*quoting Betancourt v. J.C. Penney Co.*, 554 F.2d

1206, 1209 (1st Cir. 1977)), under the circumstances presented, and especially given the close-knit family involved the Court finds that the verdict in this, case cannot be characterized as "grossly excessive," "inordinate" or "shocking to the conscience" *McDonald id., quoting Grunethal v. Long Island R. R. Co.*, 393 U.S. 156, 159 n.4 (1968). Defendant has failed to meet its burden of proof.

The testimony given by plaintiffs' expert supported damages for the children's and grandchildren's loss of nurture, loss of moral training and guidance and loss of the value of a complete family. *Griffith v. Mt. Carmel Medical Center, supra.* "Translating legal damage into money damages – especially in cases which involve few significant items of measurable economic loss – is a matter peculiarly within the jury's kin." *Wagenmann v. Adams*, 829 F.2d 196, 215 (1st Cir. 1987).

Defendant argues that the amount of moral damages awarded by the jury grossly deviates from judgments for similar injuries rendered by the courts in Puerto Rico. In *LaForest v. Autoridad de las Fuentes Fluviales de Puerto Rico*, 536 F.2d 443, 446-47 (1st Cir. 1976), the First Circuit rejected a similar argument. The court held: "A federal jury . . . is not bound in making its determination by the amount that the Commonwealth courts have awarded or approved." (citations omitted). *Id.* The court further stated that "despite the possibility of disparate awards in the federal and commonwealth courts (citation omitted), we must adhere to the rule of review commonly applied by federal appellate courts with respect to civil jury awards, which is that the jury's otherwise supportable verdict stands unless 'grossly excessive' or 'shocking to

the conscience.' " *Id.* This Court rejects defendant's urging that the Court review the verdict strictly in terms of the amounts hereto – before approved in other cases by the Supreme Court of Puerto Rico. *Id.; see also González Marin v. Equitable Life Assur. Soc.*, 845 F.2d 1140, 1149 (1st Cir. 1988).

In view of the above findings, the Court hereby DENIES defendant Hospital S.F.'s motion for judgment as a matter of law and/or for new trial and/or for remittitur (Docket #43).

IT IS ORDERED.

San Juan, Puerto Rico, January 18th, 1995.

/s/ Juan M. Perez-Gimenez
JUAN M. PEREZ-GIMENEZ
U. S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 95-1167

GLORIA IVETTE CORREA GONZALEZ, ET AL.,
Plaintiffs, Appellees,

V.

HOSPITAL SAN FRANCISCO, ET AL.,
Defendants, Appellants,

Before

Torruella, Chief Judge
Coffin, Senior Circuit Judge
Selya, Cyr, Boudin, Stahl and Lynch, Circuit Judges

ORDER OF COURT

Entered: November 28, 1995

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

/s/ Illegible
Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GLORIA IVETTE CORREA GONZALEZ, ESTHER ISAURA CORREA GONZALEZ, ANGEL SIGFREDO CORREA GONZALEZ, ANGELA LOPEZ, in representation of her minor daughters GLENDALIS CORREA LOPEZ, GLORIMAR CORREA LOPEZ, ANGELIS CORREA LOPEZ, and SARAI CORREA LOPEZ

Plaintiffs

vs.

HOSPITAL SAN FRANCISCO, ABC CORPORATION d/b/a HOSPITAL SAN FRANCISCO, JOHN AND JANE DOE, and X, Y, Z INSURANCE COMPANIES

Defendants

_____/

CIVIL NO. 92-2240GG

PLAINTIFFS DEMAND TRIAL BY JURY

COMPLAINT

(Filed Sep. 4, 1992)

TO THE HONORABLE COURT:

Plaintiffs, through their undersigned attorneys, respectfully state and pray as follows:

PARTIES AND JURISDICTION

1. Plaintiffs Gloria Ivette, Esther Isaura and Angel Sigfredo Correa González are the daughters and son respectively of Mrs. Carmen González Figueroa, now deceased. Glendalis, Glorimar, Angelis and Sarai Correa López are the grandaughters [sic] of Mrs. González Figueroa, and the daughters of her predeceased son Félix Edgardo Correa, and his wife Angela López, who appears herein in representation of her minor daughters. All of them are residents and citizens of the Commonwealth of Puerto Rico.

2. Hospital San Francisco is a medical institution in San Juan, Puerto Rico. Defendant ABC Corporation is a corporate entity, whose name is unknown to Plaintiffs at this time, that owns and operates Hospital San Francisco and does business under that name. Defendants John Doe and Jane Doe are doctors and other health professionals and staff employed by Hospital San Francisco, whose names are unknown to Plaintiffs at this time. X, Y and Z are insurance companies covering the responsibility of the other named defendants in this case, whose names will be substituted in an amended complaint when identified through discovery.

3. Federal jurisdiction is attained under 28 U.S.C.A., sec. 1331 and the Emergency Medical Treatment and Active Labor Act as amended, 42 U.S.C.A. sec. 1395dd, also known as the "Anti-dumping" statute. Damages in this case far exceed the $50,000 jurisdictional amount. Ancilliary federal jurisdiction is present over the pendent

state law claim for medical malpractice resulting in personal harm, as both claims arise out a common nucleus of operative facts.

FACTS OF THE CASE

4. On September 6, 1991 Mrs. Carmen Gloria González, a 65-year old diabetic suffering from high blood pressure, began to feel ill, and requested her son Angel Sigfredo Correa to take her to the emergency room at Hospital San Francisco, where they had her record of previous medical history and where she had been treated in the past.

5. Mrs. González and her son arrived at the hospital at approximately 1:00 P.M. on that day with this emergency medical condition. At the time the patient was feeling much worse including dizziness, general low temperature, paleness, nausea and depression. Once in the emergency room, the receptionist requested Mrs. González' health insurance plan card and told her that she had to wait. After waiting for an hour without any kind of medical attention, Mrs. González was informed by the hospital staff that they would not provide her with any kind of treatment because her plan did not cover the cost of these medical services.

6. Plaintiff Esther Isaura Correa arrived at the hospital at about 2:00 P.M. and after learning about the Defendants' refusal to provide services, drove her mother to Dr. Acacia Rojas' office in Rio Piedras, where she arrived in a very deteriorated condition. There, Dr. Rojas provided emergency treatment, but Mrs. González suffered cardiac arrest. After attempting resucitation [sic]

procedures, Mrs. González finally died when Dr. Rojas was taking her back to Hospital San Francisco in a private car.

7. In failing to provide for an appropriate medical screening examination and thereafter providing for such further treatment as was required to stabilize the patient's emergency medical condition or otherwise safely transfer this patient to another medical facility, Defendants engaged in "patient dumping" practices, which are prohibited by the anti-dumping Emergency Medical Treatment and Active Labor Act as amended, 42 USCA section 1395 dd. Defendants also acted willfully or with such gross negligence as to indicate wanton disregard for the rights of others.

8. The negligent actions and omissions of Defendant Hospital San Francisco and its staff caused in fact Mrs. González' untimely death and prior suffering due to the inferior quality of medical care, which was not of the acceptable standard in the community. This negligence includes Defendats' [sic] failure to promptly examine and to provide adequate medical treatment, resulting in the death of Mrs. González and in personal damages to Plaintiffs.

9. This professional negligence and patient dumping was the cause of the extreme physical discomfort, suffering, emotional anguish and agony experienced by Mrs. González from the time of her initial visit to the emergency room at Hospital San Francisco until her death some hours later. This cause of action is inherited by her son, daughters and the children of her predeceased son Félix Edgardo Correa.

10. Said negligence and patient dumping is also the cause of Plaintiffs having lost their beloved mother and grandmother and her love and support, which has caused them intense mental and emotional anguish and pain and suffering. Plaintiff Angel Sigfredo Correa particularly has suffered depression and emotional illness as a result of Defendants' acts and omissions.

CLAIM FOR RELIEF

11. Due to Defendants' illegal and tortious acts and omissions Plaintiffs have suffered will continue to suffer personal harm, extreme mental and emotional pain and suffering for which Plaintiffs hereby pray for relief against Defendants in the amount of no less than TWO MILLION DOLLARS ($2,000,000), as follows:

(a) To Gloria Ivette Correa, an amount of no less than FIVE HUNDRED THOUSAND DOLLARS ($500,000);

(b) To Esther I. Correa, an amount of no less than FIVE HUNDRED THOUSAND DOLLARS ($500,000);

(c) To Angel Sigfredo Correa, an amount of no less than FIVE HUNDRED THOUSAND DOLLARS ($500,000).

(d) To Glendalis Correa López, Glorimar Correa López, Angelis Correa López and Sarai Correa López, an amount of no less than ONE HUNDRED TWENTY FIVE THOUSAND DOLLARS ($125,000) each.

12. Due to Defendants' negligence, during the hours prior to her death Mrs. Carmen Gloria González

suffered personal injury, intense physical pain, suffering and mental and emotional anguish and agony which, according to Puerto Rico's successoral law constitutes a cause of action inherited by her daughters and son, Gloria Ivette, Esther Isaura and Angel Sigfredo Correa; and by the daughters of her previously deceased son, Félix Edgardo Correa, to wit, Glendalis, Glorimar, Angelis and Sarai Correa López; for which these Plaintiffs claim relief in the amount of no less than FIVE HUNDRED THOUSAND DOLLARS ($500,000) to be distributed proportionately among them.

13. Due to Defendants' failure to screen and stabilize Mrs. González' emergency medical condition and/or to properly transfer her, in violation of the Emergency Medical Treatment and Active Labor Act, resulting in her death and Plaintiffs' personal harm, claim is made for the appropriate equitable relief authorized by the Act, including but not limited to exemplary or punitive damages in the amount of no less than ONE MILLION DOLLARS ($1,000,000) to be distributed proportionately among all plaintiffs, to remedy the violation and discourage subsequent violations. In the case at bar, defendants had knowledge and present consciousness, not simply that a statute or right would be violated, but that injury would result. They willfully pursued a course of action in wanton disregard of potential harm likely to result as a consequence of that wrongful conduct.

WHEREFORE, Plaintiffs respectfully request of this Honorable Court that it grant the relief requested herein together with an amount for reasonable attorney's fees in the prosecution of this action.

In San Juan, Puerto Rico, this 4th day of September, 1992.

Respectfully submitted,

LAW OFFICES
DAVID EFRON
Attorneys for Plaintiffs
P.O. Box 29314
Rio Piedras, Puerto Rico 00929
Tel. 753-6455

By: /s/ Alberto J. Perez Hernandez
ALBERTO J. PEREZ
HERNANDEZ
USDC-PR 125110

Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd

42 § 1395dd. Examination and treatment for emergency medical conditions and women in labor

(a) Medical screening requirement

In the case of a hospital that has a hospital emergency department if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.

(b) Necessary stabilizing treatment for emergency medical conditions and labor

(1) In general

If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either –

(A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or

(B) for transfer of the individual to another medical facility in accordance with subsection (c) of this section.

(2) Refusal to consent to treatment

A hospital is deemed to meet the requirement of paragraph (1)(A) with respect to an individual if the hospital offers the individual the further medical examination and treatment described in that paragraph and informs the individual (for a person acting on the individual's behalf) of the risks and benefits to the individual of such examination and treatment, but the individual (or a person acting on the individual's behalf) refuses to consent to the examination and treatment. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such examination and treatment.

(3) Refusal to consent to transfer

A hospital is deemed to meet the requirement of paragraph (1) with respect to an individual if the hospital offers to transfer the individual to another medical facility in accordance with subsection (c) of this section and informs the individual (or a person acting on the individual's behalf) of the risks and benefits to the individual of such transfer, but the individual (or a person acting on the individual's behalf) refuses to consent to the transfer. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such transfer.

(c) Restricting transfers until individual stabilized

(1) Rule

If an individual at a hospital has an emergency medical condition which has not been stabilized (within the meaning of subsection (e)(3)(B) of this section), the hospital may not transfer the individual unless –

(A)(i) the individual (or a legally responsible person action on the individual's behalf) after being informed of the hospital's obligations under this section and of the risk of transfer in writing requests transfer to another medical facility,

(ii) a physician (within the meaning of section 1395x(r)(1) of this title) has signed a certification that based upon the information available at the time of transfer, the medical benefits reasonable expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual and, in the case of labor, to the unborn child from effecting the transfer, or

(iii) if a physician is not physically present in the emergency department at the time an individual is transferred, a qualified medical person (as defined by the Secretary in regulations) has signed a certification described in clause (ii) after a physician (as defined in section 1395x(r)(1) of this title), in consultation with the person, has made the determination described in such clause, and subsequently countersigns the certification; and

(B) the transfer is an appropriate transfer (within the meaning of paragraph (2) to that facility.

A certification described in clause (ii) or (iii) of subparagraph (A) shall include a summary of the risks and benefits upon which the certification is based.

(2) Appropriate transfer

An appropriate transfer to a medical facility is a transfer –

(A) in which the transferring hospital provides the medical treatment within its capacity which minimizes the risks to the individual's health and in the case of a woman in labor, the health of the unborn child;

(B) in which the receiving facility –

(i) has available space and qualified personnel for the treatment of the individual, and

(ii) has agreed to accept transfer of the individual and to provide appropriate medical treatment;

(C) in which the transferring hospital sends to the receiving facility all medical records (or copies thereof), related to the emergency condition for which the individual has presented, available at the time of the transfer, including records related to the individual's emergency medical condition, observations of signs or symptoms, preliminary diagnosis, treatment provided, results of any tests and the informed written consent or certification (or copy thereof) provided under paragraph (1)(A), and the name and address of any on-call physician (described in subsection (d)(1)(C) of this section) who has refused or failed to appear within a reasonable time to provide necessary stabilizing treatment;

(D) in which the transfer is effected through qualified personnel and transportation equipment, as required including the use of necessary and medically appropriate life support measures during the transfer; and

(E) which meets such other requirements as the Secretary may find necessary in the interest of the health and safety of individuals transferred.

(d) Enforcement

(1) Civil money penalties

(A) A participating hospital that negligently violates a requirement of this section is subject to a civil money penalty of not more than $50,000 (or not more than $25,000 in the case of a hospital with less than 100 beds) for each such violation. The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under this subparagraph in the same manner as such provisions apply with respect to a penalty or proceeding under section 1320a-7a(a) of this title.

(B) Subject to paragraph (C), any physician who is responsible for the examination, treatment, or transfer of an individual in a participating hospital, including a physician on-call for the care of such an individual, and who negligently violates a requirement of this section, including a physician who –

(i) signs a certification under subsection (c)(1)(A) of this section that the medical benefits reasonably to be expected from a transfer to another facility outweigh the risks associated with the transfer, if the physician knew or should have known that the benefits did not outweigh the risks, or

(iii) misrepresents an individual's condition or other information, including a hospital's obligations under this section,

is subject to a civil money penalty of not more than $50,000 for each such violation and, if the violation is gross and flagrant or is repeated, to exclusion from participation in this subchapter and State health care programs. The provisions of section 1320a-7a of this title (other than the first and second sentences of subsection (a) and subsection (b)) shall apply to a civil money penalty and exclusion under this subparagraph in the same manner as such provisions apply with respect to a penalty, exclusion, or proceeding under section 1320a-7a(a) of this title.

(C) If, after an initial examination, a physician determines that the individual requires the services of a physician listed by the hospital on its list of on-call physicians (required to be maintained under section 1395cc(a)(1)(I) of this title) and notifies the on-call physician and the on-call physician fails or refuses to appear within a reasonable period of time, and the physician orders the transfer of the individual because the physician determines that without the services of the on-call physician the benefits of transfer outweigh the risks of transfer, the physician authorizing the transfer shall not be subject to a penalty under subparagraph (B). However, the previous sentence shall not apply to the hospital or to the on-call physician who failed or refused to appear.

(2) Civil enforcement

(A) Personal harm

Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participant hospital, obtain those damages available for personal injury under the law of the State in which the

hospital is located, and such equitable relief as is appropriate.

(B) Financial loss to other medical facility

Any medical facility that suffers a financial loss as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for financial loss, under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

(C) Limitation on actions

No action may be brought under this paragraph more than two years after the date of the violation with respect to which the action is brought.

(3) Consultation with peer review organizations

In considering allegations of violations of the requirements of this section in imposing sanctions under paragraph (1), the Secretary shall request the appropriate utilization and quality control peer review organization (with a contract under part B of subchapter XI of this chapter) to assess whether the individual involved had an emergency medical condition which had not been stabilized, and provide a report on its findings. Except in the case in which a delay would jeopardize the health or safety of individuals, the Secretary shall request such a review before effecting a sanction under paragraph (a) and shall provide a period of at least 60 days for such review.

(e) Definitions

In this section:

(1) The term "emergency medical condition" means –

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in –

(i) placing the health of the individual (or with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,

(ii) serious impairment to bodily functions, or

(iii) serious dysfunction of any bodily organ or part; or

(B) with respect to a pregnant woman who is having contractions –

(i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or

(ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

(2) The term "participating hospital" means hospital that has entered into a provider agreement under section 1395cc of this title.

(3)(A) The term "to stabilize" means with respect to an emergency medical condition described in paragraph (1)(A), to provide such medical treatment of the condition as may be necessary to assure,

within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), to deliver (including the placenta).

(B) The term "stabilized" means, with respect to an emergency medical condition described in paragraph (1)(A), that no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), that the woman has delivered (including the placenta).

(4) The term "transfer" means the movement (including the discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital, but does not include such a movement of an individual who (A) has been declared dead, or (B) leaves the facility without the permission of any such person.

(5) The term "hospital" includes a rural primary care hospital (as defined in section 1395x(mm)(1) of this title).

(f) Preemption

The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section.

(g) Nondiscrimination

A participating hospital that has specialized capabilities or facilities (such as burn units, shock-trauma units, neonatal intensive care units, or (with respect to rural areas) regional referral centers as identified by the Secretary in regulation) shall not refuse to accept an appropriate transfer of an individual who requires such specialized capabilities or facilities if the hospital has the capacity to treat the individual.

(h) No delay in examination or treatment

A participating hospital may not delay provision of an appropriate medical screening examination required under subsection (a) of this section or further medical examination and treatment required under subsection (b) of this section in order to inquire about the individual's method of payment or insurance status.

(i) Whistleblower protections

A participating hospital may not penalize or take adverse action against a qualified medical person described in subsection (c)(1)(A)(iii) or a physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee reports a violation of a requirement of this section.

(Aug. 14, 1935, c. 531, Title XVIII, § 1867, as added Apr. 7, 1986, Pub. L. 99-272, Title IX, § 9121(b), 100 Stat. 164, and amended Oct. 21, 1986, Pub. L. 99-509, Title IX § 9307(c)(4), 100 Stat. 1996; Oct 22, 1986, Pub. L. 99-514, Title XVIII, § 1895(b)(4), 100 Stat. 2933; Dec. 22, 1987, Pub.

L. 100-203, Title IV, § 4009(a), 101 Stat. 1330-56, 1330-57; Dec. 22, 1987, Pub. L. 100-203, Title IV, § 4009(a)(1), formerly 40109(a)(1), (2), 101 Stat. 1330-56, 1330-57, amended and renumbered July 1, 1988, Pub. L. 100-360, Title IV, § 411(b)(8)(A)(i), 102 Stat. 771, as amended Oct. 13, 1988, Pub. L. 100-485, Title VI, § 608(d)(18)(E), 102 Stat. 2419; Dec. 19, 1989, Pub. L. 101-239, Title VI, §§ 6003(g)(3)(D)(xiv), 6211(a)-(h), 103 Stat. 2154, 2245; Nov. 5, 1990, Pub. L. 101-508, Title IV, §§ 4008(b)(1)-(3)(A), 4207(a)(1)(A), (2), (3), (k)(3), 104 Stat. 1388-44, 1388-117, 1388-124.)